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In the Supreme Court

OF THE

United States

OCTOBER TERM, 1975

No. 75-397

WARREN LOUIE, dba Waterhole # 1, *Petitioner,*

vs.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL OF THE STATE OF CALIFORNIA, *Respondent.*

PETITION FOR A WRIT OF CERTIORARI to the Court of Appeal of the State of California, in and for the First Appellate District and BRIEF IN SUPPORT THEREOF

J. BRUCE FRATIS,
2100 Mills Tower,
San Francisco, California 94104,

DENNIS T. GARY,
1666 Lombard Street,
San Francisco, California 94123,
Attorneys for Petitioner.

PERNAU-WALSH PRINTING CO. - 562 MISSION STREET - SAN FRANCISCO, CA 94105

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No.

WARREN LOUIE, dba Waterhole # 1, *Petitioner,*

vs.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL OF THE STATE OF CALIFORNIA, *Respondent.*

PETITION FOR A WRIT OF CERTIORARI
to the Court of Appeal of the State of California,
in and for the First Appellate District

Petitioner prays that a Writ of Certiorari issue to review the Judgment of the Court of Appeal of the State of California, First Appellate District, entered in the above-entitled case on May 21st, 1975, hearing Denied by the Supreme Court of California on June 19th, 1975.

CITATIONS TO OPINIONS BELOW

The decision of the Respondent, Department of Alcoholic Beverage Control of the State of California

is unreported and is printed in Appendix A hereto, infra, pages i-vii.

The Notice of Appeal from the Decision of the Respondent Department of Alcoholic Beverage Control to the Alcoholic Beverage Control of the State of California is unreported and is printed in Appendix B hereto, infra, pages ix to xi.

The decision and opinion of the Alcoholic Beverage Control Appeals Board of the State of California is unreported and is printed in Appendix C hereto, infra, pages xii to xxi.

The Decision of the Court of Appeal of the State of California First Appellate District, denying a Petition for Writ of Review (Mandate) is unreported and is printed in Appendix D hereto, infra, page xxii.

The Decision of the Supreme Court of the State of California denying a Petition for Hearing after Decision of the above Court of Appeal of the State of California is unreported and is printed in Appendix E hereto, infra, page xxiii.

The Decision of the said Court of Appeal of the State of California, denying a Petition for a Stay, Pending Petition for Writ of Certiorari in the United States Supreme Court is unreported and is printed in Appendix F hereto, infra, page xxiv.

PRIOR PROCEEDINGS

This is a Petition for a Writ of Certiorari by an individual, a retail liquor licensee, from a Decision of the Court of Appeal, State of California, First Appellate District, denying a Petition for a Writ of Review (Mandate) from said Court, to review a decision of the Respondent Department of Alcoholic Beverage control rendered December 19th, 1974, adopting the recommendation of its hearing officer submitted, following the hearing held on March 26th, 1974 (copies of the recommendation and Order of Adoption are attached as Appendix A).

Said Decision was affirmed by the Alcoholic Beverage Control Appeals Board on April 22, 1975 (copies of the Notice of Appeal and of the opinion of said Appeals Board are attached as Appendices B and C).

The Decision of the Respondent Department thereafter was left undisturbed by the denial of a Petition for a Writ of Review (Mandamus) by the Court of Appeal of the State of California, First Appellate District, Division Four, on May 21st, 1975 (attached at Appendix D).

A Petition for Hearing to the Supreme Court of the State of California was denied by Order entered June 19th, 1975 (attached as Appendix E).

A Petition to the said Court of Appeal for a Stay pending Petition for Writ of Certiorari to the United States Supreme Court was denied by Order dated July 7th, 1975 (attached as Appendix F).

GROUNDS ON WHICH JURISDICTIONS OF SUPREME COURT IS INVOKED

The Decision of the Court of Appeal of the State of California was entered on May 21st, 1975, page xxii, infra. Hearing was denied by the Supreme Court of the State of California on June 19th, 1975, page xxiv, infra.

The jurisdiction of the Court is invoked under the provisions of Title 28 U.S.C. Sections 1257(3), 2101 (c), and Rules of the Supreme Court, Rules 19 *et seq.*

The following State Statutes are drawn in question as being repugnant to the Constitution and laws of the United States:

1) California Business and Professions Code, Sections 24755 and 24755.1;

2) California Administrative Code Section 99.

The above statutes comprise a statutory scheme establishing mandatory price fixing for alcoholic beverages.

Petitioner has at all times challenged the validity of said statutory scheme on the grounds that it violates Petitioner's right to equal protection and due process of law under the 14th Amendment to the Constitution of the United States, and on the grounds that said statutory scheme violates the Sherman Anti-Trust Act, 15 U.S.C. Sections 1 and 2 as amended by the Miller Act, 15 U.S.C. Section 1 and the McGuire Act, 15 U.S.C. Section 45. The highest state court upheld their validity in the face of said challenge.

Petitioner has at all times challenged the conduct of the California Department of Alcoholic Beverage Control as being in violation of Petitioner's rights, privileges and immunities arising out of the above Federal Constitutional and statutory provisions.

The challenges mentioned above were raised at each administrative and judicial step preceding the filing of this Petition.

This Court should review this case for the further reason that many state courts have held fair trade laws unconstitutional on the grounds that they were repugnant to the due process clause of the 14th Amendment to the Constitution of the United States.

QUESTIONS PRESENTED FOR REVIEW

1) Whether or not the California Mandatory Liquor Price Fixing laws are invalid as being in violation of the Anti-trust Laws of the United States (15 U.S.C.A. §§1, 2, and 45).

2) Whether Respondent's arbitrary and capricious conduct with reference to its procedure of enforcement in accumulating three violations and charging them in a single accusation solely to enable it to impose penalties of increased severity (revocation of the license) is a violation of the Due Process Clause of the 14th Amendment to the Constitution of the United States;

3) Whether the determination, without prior notice and hearing, that Petitioner was a "habitual

offender" was a violation of the due process clause of the 14th Amendment to the Constitution of the United States.

4) Whether Petitioner was denied Due Process because Respondent failed to provide Petitioner with proper notice of the minimum price schedules or to establish that Petitioner intentionally and knowingly violated them.

5) Whether Petitioner was denied Due Process because the extreme penalty of revocation was imposed by Respondent after it improperly considered alleged prior violations by Petitioner, although no final adjudication had been rendered thereon.

6) Whether the Fair Trade statutes of the State of California with respect to the sale of intoxicants violate the Due Process clause of the 14th Amendment to the Constitution of the United States in that said statutes and regulations promulgated thereunder are designed to maintain artificially high prices of intoxicants, although such high prices bear no reasonable relationship to the public good or to any legitimate legislative objective.

THIS CASE INVOLVES THE FOLLOWING STATE AND FEDERAL STATUTES AND FEDERAL CONSTITUTIONAL PROVISIONS

a) Fourteenth Amendment to the Constitution of the United States;

b) Title 15 U.S.C.A. Sections 1, 2, and 45;

c) California Business and Professions Code, Sections 24200, 24755, and 24755.1.

See Appendix G setting forth precisely the language of the above statutes and constitutional provisions.

FACTS MATERIAL TO THE CONSIDERATION OF THE QUESTIONS PRESENTED

On October 17th, 1973, without prior Notice to the Petitioner, the Respondent Department filed an Accusation containing three counts charging that on three separate occasions on October 4th, 11th, and 26th, 1973, the Petitioner sold "Distilled Spirits" at retail to an employee of the Department at a price less than that provided for the minimum Retail Price Schedule duly filed with the Department and that such sales were in violation of Business and Professions Code, Section 24755.

The Accusation alleged that the Petitioner had four prior License violations, *all of which were pending on Appeal.*

The Department urged the existence of grounds for the imposition of penalties including the suspension and revocation of the license, contending that continuance of such license would be contrary to public welfare and morals as set forth in the California Constitution, Article XX, Section 22, and Sections 24200(a) and 24755 of the Business and Professions Code.

It was also alleged that additional grounds for suspension and revocation existed under Section 24200, Subdivision (b) in that the Licensee had violated or permitted the violation of Section 24755 of the Busi-

ness and Professions Code and Department Rule 99(a) of the California Administrative Code, Title 4.

The Hearing on the accusation was conducted on March 26th, 1974, in accordance with established procedures. Shortly thereafter the Hearing Officer issued a Proposed Decision in which he found that the allegations in all three counts were true. He recommended the extreme penalty of revocation.

On December 19th, 1974, the Respondent Department adopted the Proposed Decision in its entirety and issued its Order revoking the license of Petitioner.

A true copy of this decision is attached hereto as Appendix A, infra, pages i to vii.

Petitioner appealed the Department's Decision to the Alcoholic Beverage Control Appeals Board (hereinafter the "Board"). On April 22, 1975, the Board issued its Decision affirming the Department's Decision.

The Board rejected Petitioner's Contention that Section 24755.1 of the B and P Code does not authorize the procedure by which the Department may accumulate evidence of successive sales below minimum retail prices and then, in a single prosecution, impose cumulative penalties each of which is based on the finding of a single sale but measured in severity by the number of prior illegal sales in the series.

The Board also rejected the contention of Petitioner that if Section 24755.1 permits the imposition of such cumulative penalties, it constitutes an improper delegation of Legislative Authority in that it provides no standards to guide the Department in the assessment and cumulation of penalties and that the imposition of cumulative penalties constitutes arbitrary action in violation of the Due Process clauses of the Federal and State Constitutions.

The Court of Appeal of the State of California, First Appellate District, Division Four, summarily denied a Petition for Writ of Review (Mandamus) on May 21, 1975.

On June 19, 1975, the Supreme Court of the State of California summarily denied a Petition for a hearing after said denial by the Court of Appeal.

On July 7th, said Court of Appeal summarily denied a Petition filed by this Petitioner for a Stay pending his filing of a Petition for Writ of Certiorari in the Supreme Court of the United States.

SUMMARY OF ARGUMENT

1. The California mandatory liquor price fixing laws are invalid as being in violation of the anti-trust laws of the United States in that they do not fall within the exemptions therefrom.

2. That Respondent's arbitrary and capricious conduct with reference to its procedure of enforcement in accumulating three violations and charging them in a single accusation solely to enable it to impose penalties of increased severity (revocation of the license) is a violation of the due process clause

of the 14th Amendment to the Constitution of the United States.

3. Petitioner has been declared "an habitual offender and unwilling to conform" without prior notice and hearing. This is a violation of due process in that it is a determination of status affecting personal and property rights without prior notice and hearing.

4. Respondent's failure to provide Petitioner with proper notice of minimum price schedules is violative of due process.

5. Respondent improperly considered alleged prior violations in violation of Petitioner's right to due process of law.

6. The California fair trade laws in regard to the sale of intoxicants violate the due process clause in that regulations designed to maintain artificially high prices of intoxicants bear no reasonable relationship to the public good or to any legitimate legislative objective.

ARGUMENT

I

THE CALIFORNIA MANDATORY LIQUOR PRICE FIXING LAWS ARE INVALID AS BEING IN VIOLATION OF THE ANTI-TRUST LAWS OF THE UNITED STATES IN THAT THEY DO NOT FALL WITHIN THE EXEMPTIONS THEREFROM

In *Burke v. Ford,* 19 L.Ed.2d 554 (1967), the Supreme Court held per curiam that the District Court had jurisdiction to hear a case based on §1

of the Sherman Act against all Oklahoma liquor wholesalers who allegedly were engaged in a statewide market division. In that case, the liquor involved was completely within the state's borders and Federal law was still held to apply.

The California liquor price fixing statute has been described by a California Appellate Court Judge, in his dissenting opinion in *Allied Properties v. Department of Alcoholic Beverage Control Board,* 53 Cal.2d 141; 346 P.2d 731, stated as follows:

> "Thus, the very person or corporation that manufactures or distributes the product sets the price at which the retailer may and must sell, without any right of any kind or character on the part of any representative of the State, to challenge it for price, quality or otherwise. This, to me, is uncontrolled monopoly run riot with State sanction."

§24755 of the California Business and Professions Code, which sets up the price fixing statute, is a statute which is clearly written by and for the liquor distillers and on its face presently violates Federal Anti-trust laws. Whenever a judicial obstacle is created, the statute is changed. When the California Superior Court, For the City and County of San Francisco reversed a license revocation because there had been no finding that the liquor sold had been in free and open competition, the statute was changed so that free and open competition is no longer a requirement. The elimination of this requirement, as well as the discretion of liquor distillers, is clearly not in accord with the Anti-trust immunity provided

for by the Miller-Tydings and the McGuire Acts and minimum price fixing by agreement or compulsion is illegal per se under the Federal Anti-trust laws unless the Federal exemption statutes apply. (See *United States v. McKesson & Robbins,* 341 U.S. 305, 309-311 (1953) and *Schwegmann Bros. v. Calvert Distillers Corp.,* 341 U.S. 384, 386-388 (1950).

Since the California statute does not provide for either free and open competition or contracts, it is not immunized from Federal Anti-trust laws. *Eastman Kodak v. Federal Trade Commission* (2d Cir.) 330 U.S. 828, clearly held that the Miller-Tydings amendment only validates retail price agreements with respect to pricing of commodities which are in effective competition with similar commodities produced by others.

California has not permitted the licensee before the California Administrative Agencies or Courts to present evidence of lack of free and open competition before the State Hearing Board. See: *DeMartini v. Department of Alcoholic Beverage Control,* 215 Cal. App.2d 787, and *Dave's Market v. Department of Alcoholic Beverage Control,* 222 Cal.App.2d 671.

Analogizing the mandatory price-fixing characteristics of the statute herein to those of the normal fair trade statutes, is clearly misleading. As Justice Peters of the California Supreme Court states in his dissent in *Wilke & Holzheiser v. Alcoholic Beverage Control,* 65 Cal.2d 349 at page 381:

> "Thus, the fair trade provisions of the Alcoholic Beverage Control Act, together with the disciplinary power given the Department of Alcoholic Beverage Control directly by the Constitution, comprise a mandatory price-fixing system whereby the producers or wholesalers of branded or trademarked alcoholic beverages fix the retail prices of those beverages, and adherence to the prices is guaranteed by threat of imposition by the state of civil and criminal sanctions upon non-complying retailers."

Then Justice Peters goes on to say, at page 381:

> "The liquor fair trade law is to be distinguished from the general Fair Trade Act applicable to all branded or trademarked commodities sold at retail which are in free and open competition with others of the same general class. . . . The general act is permissive rather than mandatory. . . . It is enforced only by private suits not by criminal penalties or revocation or suspension of licenses by an administrative body."

If this Court will grant the within Petition, Petitioner will bring before this Court facts concerning the structure of the liquor industry which show that there is no real competition between the four distillers who control 90% of the liquor business in the United States.

The perniciousness of liquor price fixing laws is well analyzed by the "Moreland Commission on the Alcoholic Beverage Control Law," appointed by Governor Rockefeller. It was the Moreland report which caused New York to change its mandatory price fixing statute (which previously was like California's statute) and to pass the present New York statute

held constitutional in *Seagram & Sons v. Hostetter,* 384 U.S. 35, 16 L.Ed. 336, 86 S.Ct. 1254. The Moreland Commission found at page 1 of the report that:

> "The mandatory price controls should be eliminated because (1) New York consumers are compelled to pay unnecessarily high prices for packaged liquor, (2) competition is stifled and economical waste encouraged."

As the Commission pointed out, the only effect of mandatory price fixing could be to make drinking economically impossible for low income groups to the benefit of the wealthy and the disadvantage of the poor. This, as argued below, would appear to be a distinction in violation of the Equal Protection Clause of the Fourteenth Amendment since, in effect, it would enact Prohibition for the poor but not for the rich.

II

THAT RESPONDENT'S ARBITRARY AND CAPRICOUS CONDUCT WITH REFERENCE TO ITS PROCEDURE OF ENFORCEMENT IN ACCUMULATING THREE VIOLATIONS AND CHARGING THEM IN A SINGLE ACCUSATION SOLELY TO ENABLE IT TO IMPOSE PENALTIES OF INCREASED SEVERITY (REVOCATION OF THE LICENSE) IS A VIOLATION OF THE DUE PROCESS CLAUSE OF THE 14th AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES

Prior to the enactment of the Alcoholic Beverage Control Act the Respondent Department could punish Fair Trade violations by bringing criminal prosecutions (Section 25617 B and P Code) and by filing for the suspension or revocation of the License of the alleged violator pursuant to Section 24200.

These remedies proved impractical because of the delay and great expense involved and lengthy litigation on appeals from the Department's Orders and because the Department's Orders were automatically stayed when appealed (See Section 23082).

In enacting Section 24755.1 in 1965 the "Legislature determined that the imposition of mandatory fines, which became immediately payable despite appeals or mandate, would prove more effective in enforcing the statute than criminal prosecution or discretionary suspension and revocation of Licenses . . .".

In 1972, the Statute was further amended by the Legislature to provide for every violation of the provisions of Section 24755 committed during 36 consecutive months, the Department, in its discretion, may impose a monetary penalty *or* suspend or revoke the license as follows:

> "For the first violation, $250.00 or a suspension not to exceed ten days; for the second violation, $1,000.00 or a suspension not to exceed thirty days; for the three and subsequent violations, $1,000.00 or a suspension or revocation."

Section 24755.1 was not intended merely to exact tribute for the general fund or, by the imposition of insurmountable financial burdens, to punish or eliminate a Licensee who is in default. Rather, the purpose of the Statute was to compel, through the duress of monetary or other penalties, compliance by all Licensees with the Fair Trade provisions enacted by the Legislature. The Statute thus requires admin-

istrative practices which induce conformance with, rather than an avoidance of, the Retail Price Maintenance Provisions.

The Statute is, moreover, in character intended to serve as a notice or warning as it provides a relatively light penalty for the initial violation with the threat of more severe penalties should the Licensee thereafter fail to conform.

The discretion legally invested in an Administrative body, such as the Department, is broad and inclusive and is not subject to judicial control when exercised within legal limits. However, discretion cannot be exercised so as to "enlarge its own boundaries or support acts requiring other legal bases. Even within its legal limits the power is not unbridled. . . . 'it is . . . a legal discretion, to be exercised in conformity with the spirit of the law and in a manner to subserve not to impede or defeat the ends of substantial justice.'"

The Department in the instant case has clearly acted in an excessive manner: first, by proceeding against the Petitioner Licensee in a way designed not to induce conformance with Fair Trade practices and, second, by imposing cumulative penalties which result in revocation. This is excessive when measured against the Licensee's conduct and the legislative purpose sought to be achieved by the penalty provisions.

As to the first of such abuses, it is manifest that the Department's practice whereby a Licensee's misconduct is knowingly allowed to continue and the Department elects to accumulate evidence of multiple

violations before filing an accusation naturally tends to foster continuing violations and disruptions in the orderly sale and distribution of alcoholic beverages.

It is obvious that compliance with Fair Trade provisions by Licensees can best be accomplished by the Department's timely action including the prompt filing of accusations giving notice of violations of which it is aware.

A Departmental practice whereby notice is not given in a timely manner, but is withheld while the Licensee is afforded an opportunity to engage in a series of violations thus defeats the very purposes of the Fair Trade Law.

The arbitrariness of the Department's conduct is the greater, moreover, when it elects, for purely subjective reasons, whether (1) it will file an Accusation after the first violation and thus provide the warning intended by the Legislature that future violations will result in more severe sanctions, or (2) as in the instant case, deprive the Licensee of that warning by not filing the accusation until he is already exposed to the severest of sanctions, to wit, revocation.

As to the second Departmental abuse, it is evident that the purposes of the Statute are further frustrated by the imposition of heavy cumulative penalties upon a retailer when such penalties are used as weapons to effect a revocation of a license without prior adequate notice of wrong doing to a Licensee.

The primary purpose of the Legislation is to effect compliance by Licensees rather than revocations of

their licenses or the imposition of heavy financial penalties.

It is not necessary to determine whether the cumulative penalties imposed in any particular instance is excessive in view of the Licensee's conduct and financial status.

It is enough to note that the Departmental practice complained of could result, and in the instant case did result, in the imposition of whatever total penalty the Department, arbitrarily or otherwise, deemed to be sufficient *before filing an accusation and giving notice that the illegal sales must be terminated.*

Although the Legislature may vest the Department with authority to impose penalties for sales of distilled spirits in violation of the Fair Trade Laws, the delegation of an unlimited power to determine how great a penalty to impose would be an unlawful delegation of Legislative discretion and, certainly, the exercise of such an unlimited power through the devise of unlimited cumulative penalties would likewise be unlawful.

The particular vice in the instant case, however, lies in the subjective determination by the Department that it would seek a penalty beyond that provided for a first violation.

When, as here, a governmental entity vested with broad administrative powers acts in an arbitrary manner so as to affect capriciously the property or property rights of persons subjected to its administrative controls, it has denied to those persons Due

Process of law. "Arbitrary action is not Due Process" (*Rudder v. United States* 226 F.2d 51 at 53. Quoting from concurring opinion by Justice Bradley in *Davidson v. New Orleans* 96 U.S. 97 (24 L.Ed. 616) where it is stated: " 'In judging what is Due Process of Law, respect must be had to the cause and object of the taking . . ., and if found to be suitable or admissible in the special case, it will be adjudged to be Due Process of law; but, if found to be arbitrary, oppressive and unjust, it may be declared to be not Due Process of law' ". (*Wulzen v. Board of Supervisors* 101 Cal. 15; See also *Bogan v. New London Housing Authority* 366 F.Supp. 861, 866 and 867).

It is necessary to distinguish between action which is arbitrary or capricious from that which falls within broad discretionary limits.

When an exercise of a discretionary power becomes so abusive that it is the equivalent of arbitrary or capricious action, it may be subjected to Judicial review and intervention pursuant to Section 23090.2, Subdivision (b) of Business and Professions Code. Such should be the present case.

For the reasons stated above, Petitioner submits that the imposition of cumulative penalties resulting in the revocation of his license in the instant case is contrary to the provisions and purposes of the Alcoholic Beverage Control Act, is arbitrary and capricious in light of those purposes and constitutes a denial of Due Process of law. The Department has thus failed to proceed "in the manner required by law" (23090.2 Subdivision(b)).

The foregoing argument is taken almost verbatim from the language of the decision in the Supreme Court of California in the case of *Walsh v. Kirby,* 13 Cal.3d 95.

The Appeals Board attempted to distinguish the instant case from the unanimous decision of the California Supreme Court in *Walsh v. Kirby,* supra, by a reference to footnote 14 of the decision which reads as follows:

> "We do not express any view whether Departmental conduct similar to that in the instant case would be arbitrary if exercised against the Licensee, who, the record would show, was an habitual offender, and unwilling to conform."

It is clear that the above footnote is not even obiter dictum, because the Court expressly states that it is not rendering an opinion in a case where the record would show that the Licensee was an habitual offender and unwilling to conform.

In the instant case, there were no violations which had been finally adjudicated. All the prior violations were pending and undetermined on appeal.

In a later subdivision of this brief, Petitioner discusses the reasons why Respondent's determination that Petitioner was "an habitual offender and unwilling to conform", was a violation of Due Process in that it was made by the Respondent without prior notice and hearing.

Suffice it to say at this point that the Court of Appeal of the State of California in a Decision involving three Licensees charged with three violations

charged in a single accusation ruled on the effect of footnote 14 in the case of *Walsh v. Kirby,* supra; held in part, as follows:

> It does not follow, however, that the penalty orders of the department are reinstated. The Supreme Court has declared invalid the department practice of accumulating fair trade violations and charging all in a single accusation of multiple counts, thus enabling it to impose the most severe penalties. (*Walsh v. Kirby,* 13 Cal. 3d 95.) That case concerned fair trade violations in the sale of hard liquor. But the provision governing such violations in the sale of wine (Bus. and Prof. Code, § 24880) likewise permits increasingly severe penalties for subsequent offenses. At the time of the instant violations, the maximum penalty was 10 days suspension for a first offense, 30 days for a second and suspension or revocation for a third offense. (Stats. 1955, c. 447, p. 921, § 106.) In each of the three-count accusations here involved, an increasingly severe penalty was imposed upon the second and third count, each being treated as a separate offense. The ultimate result was revocation of the licenses of Vallerga and Latimer, and a 100-day suspension for Gourmet. The same reasons for avoiding this result in hard liquor sales apply in the case at bench. Moreover, in two of these cases, the practice results in actual revocation rather than the "de facto revocation" condemned in *Walsh.* Upon the principle of *Walsh,* we strike down the penalties here imposed.
>
> The department, however, points to a footnote in *Walsh:* "We do not express any view whether departmental conduct similar to that in the instant case would be arbitrary if exercised against

a licensee who, the record would show, was an habitual offender and unwilling to conform." (fn. 14, 13 Cal.3d at p. 105.) It argues that we should review the record of each licensee to determine whether any prior violation of statute or regulation indicated that he is "unwilling to conform." Literal application of this suggestion could well defeat the salutary purpose of *Walsh,* and we find it difficult to believe that the caveat of footnote 14 is intended to be so broad. In any event, the fixing of penalty is initially in the discretion of the department, and not that of an appellate court. Each of the three department decisions before us clearly rests its severity upon the three violations cumulatively charged in a single accusation. Each thus violates the rule of *Walsh.*

In each case, the decision of the appeals board is annulled, the decision of the department as to penalty is annulled, and the matter is remanded to the department for reconsideration of the penalty to be imposed.

(Kirby v. ABC Appeals Board and George and Rose Vallerga; Kirby v. Alcoholic Beverage Control Appeals Board and Gourmet; and Kirby v. Alcoholic Beverage Control Appeals Board and Robert B. Latimer, 47 Cal.App. (3rd) page 875 at 877), 121 Cal.Rptr. 572, 774.

III

PETITIONER HAS BEEN DECLARED "AN HABITUAL OFFENDER AND UNWILLING TO CONFORM" WITHOUT PRIOR NOTICE AND HEARING. THIS IS A VIOLATION OF DUE PROCESS IN THAT IT IS A DETERMINATION OF STATUS AFFECTING PERSONAL AND PROPERTY RIGHTS WITHOUT PRIOR NOTICE AND HEARING

The Court in *Sniadach v. Family Finance Corp.* (1969) 395 U.S. 337, 89 S.Ct. 1830, 23 L.Ed.2d 349 held that provisions of a Wisconsin prejudgment wage garnishment statute violated due process in that property was taken without prior notice and hearing. The property right involved was the use of earned wages prior to the hearing.

Sniadach was followed in *McCallop v. Carberry* (1970) 1. Cal.3d 903, 83 Cal.Rptr. 666.

In *Mehan v. Municipal Court* (1970) 7 Cal.App.3d 479, 87 Cal.Rptr. 17, Justice Molinari held that a California Statute which permitted the issuance of a pre-judgment writ of possession on notice and motion but prior to the trial on the merits of an unlawful detainer action violated due process following the *Sniadach* and *McCallop* rationale. See also *Mendoza v. Small Claims Court* (1958) 49 Cal.2d 668, 321 P.2d 9.

The Court in *Klim v. Jones* (N.D. Calif. 1970) 315 F.Supp. 109, held the California Innkeepers lien statute unconstitutional as it failed to provide for a hearing prior to the imposition of the lien.

The *Sniadach* rationale has been extended to preclude government action unless prior notice and hearing is provided. *Goldberg v. Kelly* 397 U.S. 254, 90

S.Ct. 1011, 25 L.Ed. 287 (1970) (an evidentiary hearing is required before cutting off welfare benefits); *Ricucci v. U.S.*, 425 F.2d 1252 (Ct. Cl., 1970) (Discharge of government employee without a prior hearing violates due process, citing *Sniadach* and *Goldberg).*

The *Sniadach* rationale was applied to a non-wage earner garnishment proceding in *Larson v. Featherston* (1969) 44 Wis.2d 712, N.W.2d. 20, 23, the Court stating:

Clearly a due process violation should not depend upon the type of property being subjected to the procedure.

See also *Endler v. Schutzbank* (1968) 68 Cal.2d 162, 65 Cal.Rptr. 297.

The sense of the above cases is that the rule applies unless there is some vital governmental interest to protect and a summary procedure is necessary to prevent irreparable harm.

In *Wisconsin v. Constantineau* (1971) 91 S.Ct. 507 at 509, the Supreme Court held that an individual could not be deprived of his good reputation without prior notice and hearing. The Court recognized that the state police power in regard to activities related to intoxicating liquor was extremely broad. However, in overruling the Wisconsin statute which permitted the police chief to post all retail liquor establishments with the names of anyone he deemed to be an excessive drinker, the Supreme Court established the priority of due process considerations over the public interest in the regulation of intoxicating liquors.

In this regard, the Court, speaking through Justice Douglas held:

> "We have no doubt as to the power of a state to deal with the evils described in the Act. The police power of the State over intoxicating liquors was extremely broad even prior to the Twenty-First Amendment, *Crane v. Campbell,* 245 U.S. 304, 38 S.Ct. 98, 62 L.Ed. 304. The only issue present here is whether the label or characterization given a person by "posting", though a mark of serious illness to some, is to others a stigma or badge of disgrace that precedural due process requires notice and an opportunity to be heard. We agree with the District Court that the private interest is such that those requirements of procedural due process must be met."

Also:

> "* * * the right to be heard before being condemned to suffer grievous loss of any kind, even though it may not involve the stigma and hardships of a criminal conviction is a principle basic to our society." *Joint Anti-Fascist Refugee Committee v. McGrath,* 341 U.S. 123, 168, 71 S.Ct. 624, 646, 95 L.Ed. 817 (concurring opinion).

See also *Brodie v. Connecticut* (March 2, 1971) 91 S.Ct. 780 at 786-787 and Footnotes 3-6.

Assuming for the sake of argument that footnote 14 of the case of *Walsh v. Kirby,* supra, is authority for the proposition that one who has been determined by Department to be an "habitual offender and unwilling to conform" does not have a right to Due Process of Law, as that right is defined

in *Walsh v. Kirby, supra,* it follows that Respondent can, once such a determination is made, accumulate as many violations as it wishes and, assuming the violations are subsequently proven, can impose an unlimited monetary fine or revocation of the license, at will.

If the Respondent does accumulate violations in any given case, the Respondent has necessarily made a prior determination that the licensee is an "habitual offender". This decision is necessarily made without prior notice and hearing.

Respondent's subjective and ex-parte determination that Petitioner's status is that of "an habitual offender and one unwilling to perform", is a determination of status that places his right to do business and his financial well-being in the unlimited and unrestrained discretion of Respondent, without prior notice and hearing, as required by the above-cited authorities.

IV

RESPONDENT'S FAILURE TO PROVIDE PETITIONER WITH PROPER NOTICE OF MINIMUM PRICE SCHEDULES IS VIOLATIVE OF DUE PROCESS.

In 1966, the California Supreme Court declared in *Kirby v. ABC Board of Appeals,* 71 Cal.2d 1200, that the Department must provide Licensees with Notice of Minimum Retail Price Schedules, either by way of mail or publication in Trade Journals. This case was followed by a whole line of cases adopting this rule.

In 1967, the Legislature amended Section 24755 and added Subsections (e) and (j).

Subsection (e) provided for constructive notice to all Licensees of all Price Schedules on file with the Department.

Subsection (j) provided that Price Schedules be made available to the Licensees, either by mail, publication or otherwise.

Section 24755(j) is an obvious codification of *Kirby v. ABC Appeals Board, supra,* and therefore in direct conflict with, and inconstistent with, Section 24755 (e).

Notice to the Licensee is all-important. Hence, constructive notice, alone, is not sufficient.

Due Process, as stated in *Kirby v. ABC Appeals Board, supra,* and as codified in Section 24755(j) should be interpreted as requiring actual notice.

Accordingly, Section 24755(e) should be held unconstitutional as a violation of the Due Process Clause because it purports to allow constructive, rather than, actual notice.

Walsh v. Kirby, supra, Kirby v. ABC Appeals Board, supra, and Section 24755(j) all place emphasis on Notice to the Licensee.

In order for there to be an intent to violate the Fair Trade Law there must be knowledge of the violation (i.e., selling below the minimum price schedules).

There is no evidence whatsoever in the instant case, absent the Department's proof as to its means of

providing Licensees with minimum price schedules to support its Findings, and hence, its Decision.

The evidence merely establishes that the Investigator purchased distilled spirits at a price below that contained in the certified copies of the minimum Price Schedules on file with the Department.

There is no evidence whatsoever that Petitioner had knowingly violated them. Without such intent, or guilty knowledge, there can be no violation.

V

RESPONDENT IMPROPERLY CONSIDERED ALLEGED PRIOR VIOLATIONS IN VIOLATION OF PETITIONER'S RIGHT TO DUE PROCESS OF LAW

Respondent alleged four prior violations and considered the same in assessing the extreme penalty of revocation. The alleged violations were all pending and on appeal at the time of the Decision of the Respondent in the instant case. There were no finally adjudicated prior violations.

A final Order or Decision is one which is not on appeal or one in regards to which all Administrative, Judicial and Appellate avenues have been exhausted and the decision stands affirmed.

The California Business and Professions Code Section 23095 is quoted in part below. Section 23095 of the Business and Professions Code allows a Licensee to make an offer of compromise after a decision is final.

The section in this regard reads as follows:

> "Section 23095. Petition to make Offer of Compromise; grounds for Stay; acceptance of Offer. (a) *Whenever a decision of the Department suspending a license for thirty days or less becomes final, whether by failure of the Licensee to appeal the Decision or by exhaustion of all appeals and judicial review,* the Licensee may, before the operative date of such suspension, Petition the Department for permission to make an Offer and Compromise, to be paid into the Alcoholic Beverage Control Fund, consisting of a sum of money in lieu of serving such suspension."

Thus a final decision of the Department is defined by Statute as one in regard to which all administrative and judicial avenues of review have either been exhausted or have been precluded by the expiration of appropriate time limits.

The alleged prior violations in the instant case considered by the Department in its decision to revoke were not final decisions and therefore could not be considered as finally adjudicated prior violations.

VI

THE CALIFORNIA FAIR TRADE LAWS IN REGARD TO THE SALE OF INTOXICANTS VIOLATE THE DUE PROCESS CLAUSE IN THAT REGULATIONS DESIGNED TO MAINTAIN ARTIFICIALLY HIGH PRICES OF INTOXICANTS BEAR NO REASONABLE RELATIONSHIP TO THE PUBLIC GOOD OR TO ANY LEGITIMATE LEGISLATIVE OBJECTIVE

Petitioner alleges that Section 24755 of the California Business and Professions Code violates the Constitution of the United States in that it is violative of the Due Process Clause of the Fifth Amendment and of the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution.

This State statute has been before the California Supreme Court twice in the last eight years, *Allied Properties v. Department of Alcoholic Beverage Control,* 53 Cal.2d 141, 346 P.2d 737, and *Wilke & Holzheiser v. Department of Alcoholic Beverage Control,* 65 Cal.2d 349, 420 P.2d 735.

The statute, as stated, is California's mandatory price fixing statute which provides for manufacturers to publish the price at which their brands are to be sold and the retail licensees are subjected to fines or suspension and/or revocation of license for sale below the filed price.

In the *Allied Properties* case, *supra,* the Court below found the statute Unconstitutional. On appeal, by a two to one decision of the California Court of Appeal, the trial Judge was reversed and the statute was found Constitutional.

In 1939, by a four to three decision of the Supreme Court of the State of California, the Court of Appeal was affirmed and the statute was found Constitutional. Neither an appeal nor a Petition for Certiorari were taken to the United States Supreme Court in that case.

In the case of *Wilke & Holzheiser v. Department of Alcoholic Beverage Control,* the California Supreme Court, by a five to two decision in 1966, again declared the statute Constitutional. After the California Courts' decision was final, application was made to a three-Judge District Court which decided *Wilke & Holzheiser v. Department of Alcoholic Beverage Control,* 266 F.Supp. 168 and held, at page 170 that:

> "A judgment upon the merits of the State Court action is res judicata in a subsequent Federal Court action where the parties in the subject matter are the same. This is true not only with regard to matters actually presented to sustain or defeat the right asserted but also as respects any other available matters which might have been presented to that end. . . . Plaintiff's remedy, after the final judgment of the State Courts, is that of appeal or petition for certiorari to the United States Supreme Court."

In addition to the split which exists among the California Judges themselves as to the Constitutionality of the statute (in the original case involving liquor price fixing, *Allied Properties,* six Judges held the statute Constitutional and five held it Unconsti-

tutional), there is a sharp division of authority among the highest court of other states as to the Constitutionality of similar price fixing statutes. Almost every one of the other State courts which has been confronted with similar liquor price fixing statutes has held them Unconstitutional.

In *Reynolds v. Louisiana Board of Alcoholic Beverage Control,* (La. 1966), 185 So.2d 794, the Louisiana Supreme Court held its mandatory price fixing statute (similar to that of California) Unconstitutional as violative of the Due Process Clause of the Federal Constitution. The Court states at page 812 that the statute

> "bears no real or substantial relation to the general health, morals or welfare of the people. At best, it represents an ignoble flight from competition."

A petition for certiorari was filed in the United States Supreme Court and was denied on November 14, 1966.

In addition, the California decision is in conflict with the decision of the Supreme Court of New Mexico in *Drink, Inc. v. Babcock,* 421 P.2d 798, in which the Court stated at page 803:

> "We hold that the fair trade contract and markup processes of the liquor control act are manifestly unreasonable legislation and are not an appropriate exercise of the States' police power . . ."

Such acts have also been held Unconstitutional by the Florida Supreme Court in *Scarborough v. Webb's Cut Rate Drug Company,* (1942) 150 Fla. 754, 8 So.2d 913, where the Court states at page 922:

> "The act, upon its face is one not designed to affect the public health, safety or welfare, but is designed solely for the protection of the wholesale liquor dealer by allowing him to control the retail prices so that his consumers may be forced to sell liquor at a substantial profit. . . ."

The Court further stated at page 921:

> "There is not one thing in the act to indicate that there were any legislative findings that any necessity existed for the terms of the act nor is there any power or authority vested in any board to make any findings of fact in regard thereto. No hearing is provided for, no Due Process is contemplated, all of which are certainly necessary to make a price fixing act valid."

Similar price fixing statutes were held Unconstitutional by Oklahoma in *Oliver v. Oklahoma Alcoholic Beverage Control Board,* 359 P.2d 183 (1961); in Kansas in *State v. Mermes,* 358 P.2d 936 (1961); in Illinois in *Lombardo Wine Co. v. Taylor,* 95 N.E. 2d 60 and in Nebraska in *Terry Carpenter v. Nebraska Liquor Control Commission,* 120 N.W. 2d 374.

The California price fixing statute violates the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution because it sets up a rule for liquor retailers that does not exist for any other retailers.

CONCLUSION AND PRAYER

The instant case involves the arbitrary and capricious manner of enforcement by the Department of Alcoholic Beverage Control towards its licensees.

The present statutory scheme establishing a mandatory price-fixing program permits the Respondent Department to conduct itself in an unchecked manner and to maintain artificially high prices for the benefit of the wholesale liquor industry, to the detriment of retailers and the low-income population, as well as to deprive Petitioner of his Constitutional right to due process of law.

WHEREFORE Petitioner prays that the writ issue as prayed.

In the alternative, Petitioner prays that this Honorable Court remand this case to the Supreme Court of the State of California for the following reasons:

The issue of whether the Respondent Department can accumulate violations in order to increase potential penalties has not yet been specifically ruled upon by the California courts.

At issue is the weight and interpretation to be given Footnote 14 of the opinion in *Walsh v. Kirby,* 13 Cal. 3d 95, 118 Cal.Rptr. 1.

In *Kirby v. ABC Appeals Board and George and Rose Vallerga; Kirby v. Alcoholic Beverage Control Appeals Board and Gourmet;* and *Kirby v. Alocholic Beverage Control Appeals Board and Robert B. Latimer,* 47 Cal.App.3d 875, 121 Cal.Rptr. 572, the California Court of Appeal rejected the Department's

contention that Footnote 14 permitted the Department to decide, prior to notice and hearing, that a licensee was an "habitual offender" thus permitting the Department to accumulate violations in order to increase potential penalties. Hence, the California Supreme Court has not yet resolved this conflict.

The basic issue involved is one of due process. The issue involves (a) the interpretation of California statutes; (b) the application of Federal Constitutional due process standards to such statutes; and (c) the conduct of the Respondent Department with or without statutory blessing, in accumulating violations in order to increase the penalties that may be imposed.

Dated, San Francisco, California,
September 10, 1975.

Respectfully submitted,
J. BRUCE FRATIS,
DENNIS T. GARY,
By J. BRUCE FRATIS,
Attorneys for Petitioner.

(Appendices Follow)

APPENDIX

Appendix A

State of California
Department of Alcoholic Beverage Control
Certificate of Decision

File 19501
Reg. 18934

It is hereby certified that the Department of Alcoholic Beverage Control, having reviewed the findings of fact, determination of issues and recommendation in the attached proposed decision submitted by a Hearing Officer of the Office of Administrative Procedure, adopted said proposed decision as its decision in the case therein described on December 19, 1974.

A representative of the Department will call on you on of after February 6, 1975, to pick up the license certificate.

Sacramento, California

Dated: December 19, 1974

Beatrice Smalley
Hearing and Legal Unit

ABC-132 (8-71)

State of California
Department of Alcoholic Beverage Control
Folios: 200

In the Matter of the Accusation
against
Warren Louie
DBA: Waterhole #1
366 Eighth Street
Oakland, California
Off-Sale General
under the Alcoholic Beverage Control Act.

File 19501 Licenses: 21-19501
Reg. 18934
Time of Hearing: March 26, 1974
Place of Hearing: Oakland, California

Reporter:
Leon Kopf N 3931

Appearances:
For the Department:
Donald L. Tipton, Counsel

For the Respondent:
Raymond D. Lovie
Attorney at Law
150 Financial Center Building
405-14th Street
Oakland, CA 94612

I hereby certify that the following constitutes my proposed decision in the above-entitled matter as a result of the hearing held before me at the above time

and place, after due notice thereof having been given according to law, and I hereby recommend its adoption as the decision of the Department of Alcoholic Beverage Control.

PROPOSED DECISION

The above-entitled matter came on regularly for hearing at the above-mentioned time and place. Evidence both oral and documentary was introduced. Attorney for respondent objected to the introduction of Department's Exhibit 12, which objections are more fully set forth in the record, and said exhibit was marked for identification only. Submission was deferred to permit the Department to file additional documentary evidence in support of its offer in evidence of Exhibit 12, and as respondent's attorney indicated he would be out of the country for several weeks following the hearing, additional reasonable time was given to him to respond by written objection or otherwise to the Department's additional evidence and to make such objections as respondent deems appropriate. Department's additional documentary evidence in support of its offer in evidence of Exhibit 12 was received by the Hearing Officer on April 9, 1974, and thereupon marked Exhibit 13 and no written response or objections has been received by or on behalf of respondent since said date although said additional documentary evidence was forwarded to respondent's attorney by counsel for the Department on or about April 9, 1974. Respondent's objections to Exhibit 12 are accordingly hereby overruled, Exhibit 12 is hereby received in evidence, and said additional documentary

evidence designated Exhibit 13, is also hereby received in evidence. The matter is now submitted, the hearing closed, and after due consideration, the Hearing Officer makes the following proposed decision:

FINDINGS OF FACT:

COUNT I

On or about October 4, 1973, the above-named licensee, at the above-designated licensed premises, did sell distilled spirits at retail to an employee of the Department of Alcoholic Beverage Control, at a price less than that provided for in the Minimum Retail Price Schedule duly filed with the Department of Alcoholic Beverage Control, in violation of Section 24755 of the Business and Professions Code and Rule 99(a), Title 4, California Administrative Code, as follows:

Item	Minimum Retail Price	Price Paid	Difference
Two (2) 4/5 quarts Jack Daniels 90 Proof Whiskey	$13.10	$12.98	$ .12
Tax	.72	Tax .00	Tax .72
Total	$13.82	$12.98	$ .84

COUNT II

On or about October 11, 1973, the above-named licensee, at the above-designated licensed premises, did sell distilled spirits at retail to an employee of the Department of Alcoholic Beverage Control, at a price less than that provided for in the Minimum Retail Price Schedule duly filed with the Department

of Alcoholic Beverage Control, in violation of Section 24755 of the Business and Professions Code and Rule 99(a), Title 4, California Administrative Code, as follows:

Item	Minimum Retail Price	Price Paid	Difference
Two (2) 4/5 quarts Jack Daniels 90 proof Whiskey	$13.10	$12.87	$ .23
Tax	.72	Tax .00	Tax .72
Total	$13.82	$12.87	$ .95

COUNT III

On or about October 26, 1973, the above-named licensee, at the above-designated licensed premises, did sell distilled spirits at retail to an employee of the Department of Alcoholic Beverage Control, at a price less than that provided for in the Minimum Retail Price Schedule duly filed with the Department of Alcoholic Beverage Control, in violation of Section 24755 of the Business and Professions Code and Rule 99(a), Title 4, California Administrative Code, as follows:

Item	Minimum Retail Price	Price Paid	Difference
Two (2) 4/5 quarts Ancient Age 86 proof Kentucky Straight Bourbon Whiskey	$10.78	$ 8.33	$2.45
Tax	.59	Tax .00	Tax .59
Total	$11.37	$ 8.33	$3.04

LICENSE'S PREVIOUS RECORD:

Currently licensed as above and since 11-2-71. Accusation filed 6-13-72, Reg. #15289, viol. Fair Trade; Decision 12-29-72, fined $5,250.00; $5,250 accepted. Appealed 1-26-73; pending. Accusation filed 5-1-73, Reg. #17618, viol. Fair Trade; pending. Accusation filed 7-30-73, Reg. #18387, viol. Fair Trade, pending. Accusation filed 10-2-73, Reg. #18775, viol. Fair Trade, pending.

DETERMINATION OF ISSUES PRESENTED:

1. By reason of the foregoing facts, grounds for suspension or revocation of such license exist and the continuance of such license would be contrary to public welfare and morals, as set forth in Article XX, Section 22, State Constitution, and Section 24200 (a), Business and Professions Code.

2. Additional grounds for suspension or revocation under Section 24200(b), Business and Professions Code, exist in that respondent has violated or permitted the violation of Section 24755, Business and Professions Code, and Title 4, California Administrative Code Rule (Section) 99(a), as to each of Counts I, II, and III.

3. By reason of licensee's previous record in connection with the facts found under Counts I, II, and III, separate grounds for suspension or revocation of such license exist as to each of said counts, under Section 24755.1, Business and Professions Code.

PENALTY OR RECOMMENDATION:

The license is revoked under Counts I, II, and III herein above referred to, separately, severally, and collectively.

Dated at: San Francisco, California
December 4, 1974

/s/ Jerome P. Herst
Jerome P. Herst
Hearing Officer of the Office of
Administrative Hearings
State of California

VERIFICATION (Standard) CCP 446, 2015.5
I declare that:

I am the petitioner in the above entitled action; I have read the foregoing Petition for Writ of Mandamus/ Supersedeas; Memorandum of Points and Authorities. and know the contents thereof; the same is true of my own knowledge, except as to those matters which are therein stated upon my information or belief, and as to those matters I believe it to be true.

I declare under penalty of perjury that the foregoing is true and correct and that this verification was executed on May 19, 1975, at Oakland, California.

WARREN LOUIE

PROOF OF SERVICE BY MAIL—
CCP 1013a, 2015.5

I declare that:

I am (a resident of/employed in) the county of Alameda, California. I am over the age of eighteen years and not a party to the within cause; my (business) address is 411 Central Building, 436 - 14th Street, Oakland, Ca. 94612. On May 19, 1975, I served the within Petition for Writ of Mandamus/Supersedeas and/Memorandum of Points and Authorities on the Respondent in said cause, by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid, in the United States mail at Oakland, California addressed as follows:

Evelle J. Younger, Attorney General State Building San Francisco, Ca. 94102	Alcoholic Beverage Control 1215 "O" Street Sacramento, Ca. 95814

Alcoholic Beverage Control Appeals Board, 1215 "O" Street, Sacramento, California 95814.

I declare under penalty of perjury that the foregoing is true and correct, and that this declaration was executed on May 19, 1975, at Oakland, California.

A. M. WOOTON /s/ A. M. Wotton
A. M. Wotton

Appendix B

Attorney for Licensee
Appellant.

Before the Alcoholic Beverage Control Appeals Board
of the State of California.

In the Matter of the Accusation
against
Warren Louie,
dba: Waterhole #1,
366 - 8th Street
Oakland, California
Off-Sale General License
under the Alcoholic Beverage
Control Act.

File No. 19501
Reg. No. 18934

NOTICE OF APPEAL

To: THE ALCOHOLIC BEVERAGE CONTROL APPEALS BOARD:

You and Each of You Will Hereby Take Notice that Warren Louie, dba Waterhole #1, hereby appeals from the decision of the Department of Alcoholic Beverage Control, dated December 19, 1974, whereby said respondent was assessed the following penalties:

1. Pursuant to Sections 24200(a) and 24200(b) of the Business and Professions Code, for the violations

found under Counts I, II and III, separately, severally and collectively, the license is revoked.

Said appeal will be based upon the provisions of Section 23084, Business and Professions Code and particularly, subdivisions (a), (b), (c) and (d), which are as follows:

* * *

(a) Whether the Department has proceeded without, or in excess of its jurisdiction;

(b) Whether the Department has proceeded in the manner required by law;

(c) Whether the decision is supported by the findings; and

(d) Whether the findings are supported by substantial evidence in the light of the whole record.

The following specific questions are to be considered by the Board on review:

1. Whether there was/were sufficient evidence to support the finding of violation as to said counts.

Notice Is Further Given pursuant to statute and the rules of the Appeals Board that the appellant herein intends to and will file written briefs in connection with said appeal, and desires to make oral arguments in support of said appeal. Request has been made to the Department of Alcoholic Beverage Control that the record on appeal be prepared, including all pleadings, all notices and orders issued by the Department, the proposed decision by the hearing officer, the final decision, a transcript of all proceedings, the exhibits admitted, the written evidence, and any other papers in the case.

Dated this 15th day of January, 1975, at Oakland, California.

/s/ Raymond D. Louie
Raymond D. Louie,
Attorney for Appellant.

Proof of Service by Mail—1013a, 2015.5 C.C.P.

I, the undersigned, say:

I am a citizen of the United States and a resident of the county of Alameda

I am over the age of eighteen years and not a party to the within entitled action; my business address is: 411 Central Building, 436 14th Street, Oakland, Ca 94612

On January 13, 1975, I served the within Notice of Appeal on the Complainant in said action, by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid, in the United States mail at Oakland, California addressed as follows:

Department of Alcoholic Beverage Control
1215 O Street
Sacramento, California 95814

I, Raymond D. Louie, certify (or declare), under penalty of perjury,* that the foregoing is true and correct.

Executed on January 13, 1975 at Oakland, California

/s/ Raymond D. Louie

*Proof of service by mail forms, being signed under penalty of perjury, do not require notarization.

Appendix C

Before the Alcoholic Beverage Control Appeals Board
of the State of California

In the Matter of the Accusation
against
Warren Louie
dba Waterhole #1
366 Eighth Street
Oakland
Respondent & Licensee
off-sale general license
under the Alcoholic Beverage
Control Act.

AB-4134

File No. 19501; Reg. No. 18934
H/O: Herst

Time & Place of Hearing:
April 10, 1975, @ 10 a.m.
World Trade Center
San Francisco, California

For Department:
Honorable Evelle J. Younger
Attorney General
Matthew Boyle
Deputy Attorney General

For Appellant:
Raymond Louie, Esq.

[Filed April 22, 1975]

Warren Louie, doing business as Waterhole #1, has appealed a decision of the Department of Alcoholic

Beverage Control which determined that grounds for the suspension or revocation of appellant's license existed and the continuance of such license would be contrary to public welfare and morals, as set forth in article XX, section 22, of the state Constitution and section 24200(a) of the Business and Professions Code; that additional grounds for suspension or revocation under section 24200(b), Business and Professions Code, existed in that appellant had violated or permitted the violation of section 24755, Business and Professions Code, and section 99(a), title 4, California Administrative Code, as to each of counts I, II, and III; that by reason of licensee's previous record in connection with the facts found under counts I, II, and III, separate grounds for suspension or revocation of such license existed as to each of said counts under section 24755.1 of the Business and Professions Code. As a penalty, it was ordered that appellant's license be revoked under counts I, II, and III separately, severally, and collectively.

This appeal is based upon all grounds available under section 23084 of the Business and Professions Code.

The department's decision contains the following:

"FINDINGS OF FACT:

"COUNT I

"On or about October 4, 1973, the above-named licensee, at the above-designated licensed premises, did sell distilled spirits at retail to an employee of the Department of Alcoholic Beverage Control, at a price less than that provided for in the Mini-

mum Retail Price Schedule duly filed with the Department of Alcoholic Beverage Control, in violation of Section 24755 of the Business and Professions Code and Rule 99(a), Title 4, California Administrative Code, as follows:

"Item	Minimum Retail Price	Price Paid	Difference
Two (2) 4/5 quarts Jack Daniels 90 proof Whiskey	$13.10	$12.98	$ .12
Tax	.72	Tax .00	Tax .72
Total	$13.82	$12.98	$ .84

"COUNT II

"On or about October 11, 1973, the above-named licensee, at the above-designated licensed premises, did sell distilled spirits at retail to an employee of the Department of Alcoholic Beverage Control, at a price less than that provided for in the Minimum Retail Price Schedule duly filed with the Department of Alcoholic Beverage Control, in violation of Section 24755 of the Business and Professions Code and Rule 99(a), Title 4, California Administrative Code, as follows:

"Item	Minimum Retail Price	Price Paid	Difference
Two (2) 4/5 quarts Jack Daniels 90 proof Whiskey	$13.10	$12.87	$ .23
Tax	.72	Tax .00	Tax .72
Total	$13.82	$12.87	$ .95

"COUNT III

"On or about October 26, 1973, the above-named licensee, at the above-designated licensed premises,

did sell distilled spirits at retail to an employee of the Department of Alcoholic Beverage Control, at a price less than that provided for in the Minimum Retail Price Schedule duly filed with the Department of Alcoholic Beverage Control, in violation of Section 24755 of the Business and Professions Code and Rule 99(a), Title 4, California Administrative Code, as follows:

"Item	Minimum Retail Price	Price Paid	Difference
Two (2) 4/5 quarts Ancient Age 86 proof Kentucky Straight Bourbon Whiskey	$10.78	$ 8.33	$2.45
Tax	.59	Tax .00	Tax .59
Total	$11.37	$ 8.33	$3.04

"LICENSEE'S PREVIOUS RECORD:

"Currently licensed as above and since 11-2-71. Accusation filed 6-13-72, Reg. #15289, viol. Fair Trade; Decision 12-29-72, fined $5,250.00; $5,250 accepted. Appealed 1-26-73, pending. Accusation filed 5-1-73, Reg. #17618, viol. Fair Trade; pending. Accusation filed 7-30-73, Reg. #18387, viol. Fair Trade; pending. Accusation filed 10-2-73, Reg. #18775, viol. Fair Trade, pending.

"DETERMINATION OF ISSUES PRESENTED:

"1. By reason of the foregoing facts, grounds for suspension or revocation of such license exist and the continuance of such license would be contrary to public welfare and morals, as set forth in Article XX, Section 22, State Constitution, and Section 24200(a), Business and Professions Code.

"2. Additional grounds for suspension or revocation under Section 24200(b), Business and Professions Code, exist in that respondent has violated or permitted the violation of Section 24755, Business and Professions Code, and Title 4, California Administrative Code Rule (Section) 99(a), as to each of Counts I, II, and III.

"3. By reason of licensee's previous record in connection with the facts found under Counts I, II, and III, separate grounds for suspension or revocation of such license exist as to each of said counts, under Section 24755.1, Business and Professions Code."

William Ellidge, a special investigator for the Department of Alcoholic Beverage Control, testified that on October 4, 1973, October 11, 1973, and October 26, 1973, he purchased the alcoholic beverages (department's exhibits 2 through 7) set forth in the department's decision at licensed premises for less than the minimum retail price in effect at the time (department's exhibits 8 and 9); at the time of each purchase he presented a card which had been previously issued to him, under the name of Al Klein, by licensed premises; on October 4, 1973, he also furnished a driver's license bearing the name of Al Klein; all purchases were paid for in cash and a receipt was not given to him on any of the three occasions (R.T. 3-19).

No witnesses were presented on behalf of the licensee.

On appeal, appellant argues the findings are not supported by substantial evidence; this is because they are based upon uncorroborated testimony, unmarked bottles of liquor, no cash register receipts,

and no evidence establishing the fair trade price lists were published in trade journals or mailed to the licensee; that as to the latter, although constructive notice is provided for as to distilled spirits under subdivision (e) of Business and Professions Code section 24755, mandatory publication or mailing is required as to wine (Business and Professions Code, section 24875); there is no rational reason for the distinction; due process requires actual notice be given in both instances; also, there was no evidence the minimum retail price lists were, in fact, in effect at the time of each violation, since a change may be made on fifteen days' notice, citing subdivision (d) of Business and Professions Code section 24755.

None of the foregoing issues raised on appeal are deemed to be of merit. We are not aware of any legal requirement that corroboration is required to establish a fair trade violation; the bottles of alcoholic beverages purchased by the department were received in evidence without objection (R.T. 19); no cash register receipt was issued as to each of the purchases (R.T. 17); the effective minimum retail price schedules as to the alcoholic beverages purchased were also received into evidence without objection (R.T. 20). With respect to the latter, there is no statutory requirement that licensees receive actual notice of minimum retail price schedules (*Reimel v. Dept. of Alcoholic Bev. Control Appeals Board, et al.*, 256 Cal.App.2d 158 [64 Cal.Rptr. 26]). Business and Professions Code section 24755(e) and paragraph (a) of section 99.2, title 4, California Administrative Code, provide that once a price schedule is filed with the department, it is held to constitute constructive

notice of its contents to any licensee affected thereby. The fact that the mode by which a licensee is to receive notice of minimum retail price schedules pertaining to wine (Business and Professions Code, section 24875) may differ from that relating to distilled spirits, does not establish a denial of due process (see *Joseph's of Calif. v. Dept. of Alcoholic Bev. Control Appeals Board,* 19 Cal.App.3d 785).

We next consider appellant's contention that the department has acted in excess of its jurisdiction and has not acted in the manner required by law; that the accumulation of violations in instant accusation, whereby the department seeks to revoke appellant's license, is another example of the department's preconceived plan or scheme to put appellant out of business, citing *Walsh v. Kirby,* 13 Cal.3d 95; at the time of filing this accusation, the department knew that two other accusations had been filed against appellant since July 1973 for fair trade violations and that they were still pending on appeal.

In *Walsh v. Kirby, supra,* 13 Cal.3d 95, the court held that in those instances where a licensee had a previous good record, the accumulation of multiple violations by the department before filing an accusation, thereby exposing the licensee to heavy cumulative penalties, constituted a denial of due process of law; the department thus failed to proceed in the manner required by law.

The primary thrust of the court's decision was directed to the fact that such conduct by the department was improper because the licensee had not first been placed on notice, by the filing of an accusation

after the first fair trade violation, that future violations of this type would result in more severe sanctions. However, it was further stated in *Walsh v. Kirby, supra,* 13 Cal.3d 95, fn. 14, p. 105:

> "We do not express any view whether departmental conduct similar to that in the instant case would be arbitrary if exercised against a licensee who, the record would show, was an habitual offender and unwilling to conform. (See *Dave's Market, Inc. v. Dept. of Alcoholic Beverage Control* (1963) 222 Cal.App.2d 671, 680 [35 Cal. Rptr. 348].)"

The case of *Dave's Market, Inc. v. Dept. of Alcoholic Bev. Control, supra,* 222 Cal.App.2d 671 [35 Cal.Rptr. 348, 353] provides in pertinent part:

> "The licensee next argues that the reference in the accusations in this case to other charges pending against the licensee involving sales of whiskey in violation of the fair trade contracts, unduly prejudiced the hearing officer. The record reveals that the pending status of the prior proceedings was noted after each listing thereof in the accusations, twice by the hearing officer during the hearing itself and again in the proposed decision of the hearing officer. Each time the hearing officer's attention was directed to the matter, he responded emphatically that he would not consider these prior matters unless they became final before he reached his decision in the case. The proposed decision states that the recommendation is based on the two accusations and that none of the prior matters form any part of the basis for the recommendation. We must presume that the hearing officer did as he said he would do (Code Civ. Proc. sec. 1963, sub. 15).

> Furthermore, in administrative matters, consideration of the prior disciplinary proceedings is entirely proper (Dudney v. State Bar, 8 Cal.2d 555, 66 P.2d 1199), and the prior record of a licensee is relevant and material evidence of his knowledge of and compliance with the laws involved therein (Beamon v. Dept. of Motor Vehicles, 180 Cal.App.2d 200, 4 Cal.Rptr. 396)."

After noting that prior fair trade proceedings against the licensee were excluded by the hearing officer because they were still in a pending status, the court in *Dave's Market, Inc.* nevertheless went on to state that in administrative matters consideration of prior disciplinary proceedings is entirely proper, and the prior record of the licensee is relevant and material evidence of his knowledge of and compliance with the laws involved therein. Furthermore, it is to be noted that when ruling upon the penalty, the court stated that the evidence in the record showed a deliberate and repeated course of conduct in violation of the law.[1]

Such a situation exists with respect to the matter before us. As indicated in the department's decision (set forth hereinabove), the licensee's prior record is as follows:

> "Currently licensed as above and since 11-2-71. Accusation filed 6-13-72, Reg. #15289, viol. Fair Trade; Decision 12-29-72, fined $5,250.00; $5,250 accepted. Appealed 1-26-73; pending. Accusation filed 5-1-73, Reg. #17618, viol. Fair Trade;

[1]The two accusations before the court at the time (Reg. No. 13623, AB-1484, and Reg. No. 13624, AB-1485) pertained to two sales of alcoholic beverages on May 5, 1960 and one sale of alcoholic beverages on May 10, 1960.

> pending. Accusation filed 7-30-73, Reg. #18387, viol. Fair Trade; pending. Accusation filed 10-2-73, Reg. #18775, viol. Fair Trade, pending."[2]

If consideration could not be given to prior fair trade accusations filed against a licensee until all avenues of appeal have been exhausted, it would permit a licensee, as in the matter before us, to continue to engage in fair trade violations for an extended period of time.

There is no question that by virtue of the initial accusation having been filed against appellant for the same type of violation, he was placed on notice that such future violations may result in a more severe penalty *(Walsh v. Kirby, supra,* 13 Cal.3d 95). Nevertheless, as indicated by the above prior record, as well as the accusation before us, the appellant deliberately continued to engage in a similar course of conduct. Under such circumstances, we consider the penalty of revocation to be appropriate *(Walsh v. Kirby, supra; Dave's Market, Inc. v. Dept. of Alcoholic Bev. Control, supra,* 222 Cal.App.2d 671 [35 Cal.Rptr. 348]).

The department's decision is hereby affirmed.

EUGENE V. LIPP, MEMBER
PETER M. FINNEGAN, MEMBER
ALCOHOLIC BEVERAGE CONTROL
APPEALS BOARD

[2]All of these matters are currently on appeal before this board. Decisions thereon had been held in abeyance pending the Supreme Court's decision in *Walsh v. Kirby, supra,* 13 Cal.3d 95. Also, a petition for writ of mandate, filed by appellant in *Louie, etc. v. Dept. of Alcoholic Bev. Control,* file no. 19501, reg. no. 17618, AB-4040, was denied by the California Supreme Court (S.F. 23095) on January 29, 1975.

Appendix D

Court of Appeal of the State of California
in and for the
First Appe late District

Division Four

No. 37024

Warren Louis (sic), dba Waterhole # 1,
Petitioner,
vs.
Department of Alcoholic Beverage Control,
Respondent.

[Filed May 21, 1975]

BY THE COURT:

The petition for writ of mandamus is denied.

Dated May 21 1975

Christian, J. Acting P.J.

Appendix E

Order Due
June 20, 1975

In the Supreme Court of the State of California
In Bank

G. E. Bishel, Clerk

Louie, Etc.

v.

Department of Alcoholic Beverage Control

Supreme Court
Filed
Jan 19 1975

ORDER DENYING HEARING

After Judgment by the Court of Appeal
1st District, Division 4, Civil No. 37024

[Filed June 20, 1975]

Petition for hearing DENIED.

Wright
Chief Justice

Appendix F

Court of Appeal of the State of California
in and for the
First Appellate District

Division Four

No. 37024

Warren Louis (sic), dba Waterhole # 1,
Petitioner,

vs.

Department of Alcoholic Beverage Control,
Respondent.

[Filed July 7, 1975]

BY THE COURT:

The petition for stay pending petition for writ of certiorari in the United States Supreme Court is denied.

Dated Jul 7 1975

Caldecott, P.J.

Appendix G

CALIFORNIA ADMINISTRATIVE CODE, TITLE 4, SECTION 99

99. Minimum Retail Price Schedules. (a) Posting of Minimum Retail Price Required. No off-sale licensee shall sell any package of distilled spirits at a price less than the effective minimum retail price of such package filed with the department, unless written permission is granted by the department for good cause shown and for reasons not inconsistent with the law.

The licensed owner or person in control of a brand, trade mark or name appearing on a package of distilled sprits which is to be sold for consumption off the licensed premises in California must file a "Distilled Spirits Minimum Retail Price Schedule" containing the minimum bottle and case prices to consumers for every distilled spirits item carrying that brand, trade mark or name.

(b) Brand Defined. The word "brand" as used herein means "brand, trademark, label or name," as shown on the primary lable, and if an additional secondary name or a different shape or color of label is used, each will be considered to be a separate brand.

(c) Distilled Spirits Item Defined. "Distilled spirits item" as used herein means a distilled spirits package that differs from all other distilled spirits in addition to its brand, as defined in (b) above, in any one of the following categories: (1) Type of

distilled spirits including type of bottling (in bond or not in bond), and type of blend (blend of straight whiskeys or spirits blend); (2) Percentage of Straight Whiskey; (3) Age, if shown on the label; (4) Proof; (5) Origin (domestic or imported); (6) Bottle size; and (7) Number of bottles in a case.

When a container other than the normal container for a brand is used as in the case of a decanter, higher minimum retail prices must be established to reflect any additional cost involved if it has utilitarian value other than as a container. Such additional cost must not be less than the actual cost, as defined in Section 17026 of the Unfair Practices Act.

Where a single container constitutes a case, the minimum retail bottle and case price must be the same.

(d) Distilled Spirits Sold "On-Sale" Only. If a particular item is labeled to indicate that it is intended for sale to and for dispensing by on-sale retailers only (such as "bar package", "for on-sale only"), the minimum retail price thereof need not be filed. However, if any sale for off-sale consumption of such item should be made, the licensee making such sale will have violated the law.

(e) Who Files Minimum Retail Price Schedules. Only one licensee is permitted to file a "minimum retail price schedule" containing the price for the same brand, type and proof for the same trading area. However, different prices may be filed in the Northern and Southern trading areas.

This means that (1) the owner of the brand or the corporate subsidiary who exclusively markets the products thereof and so is the controller of the brand, if licensed in California, if other than a retailer, must file; or (2) if the owner of the brand is not licensed in California and has no corporate subsidiary marketing California, any licensee, other than a retailer, authorized by him on a form prescribed by the department must file, such as a wholesaler or importer authorized by an out-of-state or out-of-country brand owner; or (3) if the brand is owned by a retailer, the California-licensed manufacturer or rectifier who bottles an item of distilled spirits under that brand must file for the item; or (4) if none of the three situations above apply and the brand is owned by a retailer, the importing wholesaler must file. If none of the three situations above apply and the brand is not owned by a retailer, then any licensee, other than a retailer, who secures the approval of the department must file.

(f) Price Schedule Sheets to be Filed. Four copies of a "Distilled Spirits Minimum Retail Price Schedule" on a form prescribed by the department must be filed with the department at its headquarters office, 1215 O Street, Sacramento, California 95814, and one copy retained by the licensee in his office for inspection. The "Minimum Retail Price Schedule" may be printed, typewritten or otherwise duplicated on 16 or 20 pound paper on a format and size prescribed by the department and must show the form number "ABC-705" in the lower left-hand corner of the face of the sheet. All information called for on the form

sheet must be supplied. A separate set of "Price Schedules" must be made originally, or if added later as a new item, for every different type of distilled spirits, and if that type has different categories as defined in (2), (3), (4) and (5) in the definition of "Distilled Spirits Item" in (c) above, a separate set must be made for each such difference. Each schedule must contain every bottle size (6) and every size of case (7) in which that brand, type, etc., will be sold. When a new bottle size or new size case is to be sold, or the price of any size of bottle or size of case already on file is to be changed either independently or to meet the price of a competitive brand, new sets of price schedules, in quadruplicate, must be filed to replace those on file and must also include all the information that was on the superseded schedule. Both minimum retail bottle price and minimum retail case prices covering all case sizes must be shown on the price schedules for each size and type.

(g) Filing Dates; New Item. A set of original schedules for new items must be filed on or before the close of business of the fifteenth day of any calendar month to take effect on the first day of the following month and shall be accompanied by a copy of the primary label for identification purposes.

(h) Change of Minimum Retail Price on File. A set of replacement schedules must be filed on or before the close of business of the fifteenth day of any calendar month, to be effective on the first day of the second succeeding month.

(i) Change in Price of an Item to Meet Price of Competitive Brand. A set of replacement schedules for competitive items must be filed on or before the close of business of the fifteenth day of any calendar month, to be effective on the first day of the following month.

A competitive brand is a brand of the same type of distilled spirits as the brand for which a change in price is being filed and for which at the time of filing there is on file a "Price Schedule" sheet filed by some other licensee showing a minimum retail price for the competitive brand item within one dollar per gallon of the price being charged, and proportionately for smaller sizes. The same type of distilled spirits means one identical as to categories (1) and (5) in the definition of "Distilled Spirits Item" in (c) above; the price change involved must apply to the identical item indicated in categories (6) and (7).

If a price is filed to meet the price of a competitive brand, the price so filed shall be the same as the price which is being met.

(j) Filing Date Exception. Whenever the fifteenth day of any month falls on Saturday, Sunday or a legal holiday, the price schedules required to be filed may be filed not later than the close of business of the next business day.

(k) Deliveries. No manufacturer, wholesaler or rectifier shall make deliveries of any particular item of distilled spirits to any off-sale retail licensee before a "Price Schedule" with that item thereon has been

filed with the department; thereafter he may make deliveries thereof within such time before the price becomes effective as would give the retailer reasonable time to get the item ready for sale upon the price becoming effective.

(l) Withdrawal of Item from Price Schedule. No item may be deleted from a replacement "Price Schedule" once it has been filed on an original schedule until the department authorizes such deletion when the department makes a finding that the item is carried in wholesale and off-sale retail inventories in only very small quantities.

(m) Transfer of Price Filing Obligation. When, for any reason, price filing responsibility for any item is transferred from one licensee to another, the price schedules of the licensee then on file will continue in effect until replaced by an effective new filing by the successor which will be considered an amendment, change or modification to a schedule already on file.

(n) Tax Increase or Government Order. Pursuant to an order issued by the department, any price schedule may be changed at any time to reflect changes in federal or state excise taxes on distill spirits or to comply with the requirements of any order issued by the federal government and relating to price control.

(o) Sales as Loss Leaders Prohibited. All distilled spirits minimum retail prices filed under the provisions of Section 24755 shall comply with all the provisions of said section including the provisions of

subsection (g) which prohibits the sale of distilled spirits as a loss leader. Any licensee filing distilled spirits minimum retail price below the purchasing retailer's cost of acquisition plus said retailer's cost of doing business as referred to in said subsection shall produce evidence to show that such price was filed to meet the legal price of a competitor selling the same article or product.

SECTION 24755 BUSINESS AND PROFESSIONS CODE

§ 24755. Minimum retail price schedule; filing; amendments; rejection of non-complying schedules; loss leader sales; exempt sales

(a) No package of distilled spirits which bears the brand, trademark or name of the owner or person in control shall be sold at retail in this state for consumption off the license premises unless a minimum retail price for such package first shall have been filed with the department in accordance with the provisions of this section.

(b) A price for each of such packages shall be in a minimum retail price schedule setting forth with respect to each package the exact brand, trademark or name, capacity, and type of package, type of distilled spirits, age and proof, where stated on the label, and the minimum selling price at retail. The price for any such package may be filed separately and differently for the trading area of southern California and the trading area of nothern California. The trad-

ing area of southern California shall consist of the Counties of Santa Barbara, Ventura, Los Angeles, Orange, Riverside, San Bernardino, Imperial and San Diego. The northern California trading area shall consist of the other counties of the state. No more than one person shall file a schedule for the same package for the same trading area. * * *

(c) Such schedule shall be filed by (1) the owner of the brand, if licensed in the state; (2) any licensee, other than a retailer, selling the brand and who is authorized in writing by the brand owner to file such schedule if the brand owner is not licensed in this state; (3) a manufacturer or rectifier licensed in this state and who bottles under the brand owned by a retailer; or (4) any licensee with the approval of the department, if the owner of the brand does not file or is unable to file a schedule or authorize a licensee other than a retailer to file such schedule.

(d) Schedules filed pursuant to this section may be amended, changed, or modified by filing such amendments, change, or modification with the department on or before the 15th day of any month to take effect on the first day of the second succeeding calendar month; except that prices filed for a brand, size, or type not included in a schedule in effect at the time such brand, size or type is filed, and prices filed to meet the price of a competitive brand, may be filed on or before the 15th day of any month to take effect on the first day of the following month. For the purpose of this section, a competitive brand shall mean any brand of the same type of distilled spirits having a filed selling price at retail within one dollar ($1) per gallon of the brand for which a competitive price is filed.

Asterisks *** indicate deletions by amendment.

The department shall reject any price schedule which does not comply with this subdivision.

(e) A price schedule or amendment, change or modification thereof as provided for by this section shall be deemed filed when received, either by personal delivery or mail, at the headquarters office of the department in Sacramento. Upon such filing, a price schedule or amendment, change or modification thereof shall become a public record. Such filing of a price schedule or amendment, change or modification thereof shall constitute constructive notice of its contents to any licensee affected thereby.

(f) No off-sale licensee shall sell any package of distilled spirits at any price less than the effective filed price of such package unless written permission is granted by the department, for good cause shown and for reasons not inconsistent with this division.

(g) No retail licensee shall sell any package of distilled spirits as a loss leader. "Loss leader," as used in this section, means a sae below cost as such cost is defined in Sections 17026 to 17029, inclusive of this code, except that a sale below cost made under the provisions of Section 17050 of this code shall not be deemed a loss leader sale.

(h) The provisions of this section shall not apply to:

(1) A closeout sale made in good faith and approval by the department when the following conditions exist: (i) the stock of distilled spirits sought to be closed out has been in this state, either in the possession of the vendor who sold it to the retailer or in the possession of the retailer who seeks to close out the brand, for a period of not less than six months; (ii) the stock of distilled spirits to be closed out was not brought into this state for the purpose of offering it, or any part of it, at a closeout sale; (iii) at least 10 days prior to filing a request with the department for approval to sell the stock at a closeout sale, the retailer had offered to return the distilled spirits, at his original invoice cost, to both the vendors from whom he purchased them or to his successor and to the licensee who filed the minimum price schedule under the provisions of this section; (iv) such offer of return was not accepted.

At the place of any closeout sale and upon any package of distilled spirits to be so sold and in any advertisement in connection therewith, public notice shall be given of the sale as a closeout sale. Following the conclusion of a closeout sale, the retailer who conducted such sale shall not sell the same brands of distilled spirits for a period of at least one year.

(2) Sales made with the approval of the department when the distilled spirits or the package is damaged or deteriorated in quality and notice of this fact is given to the public at the place of any such sale and upon the package offered for sale and in any advertisement in connection therewith.

(3) Sales made by any officer acting under the orders of any court.

(4) Sales of distilled spirits for use in the manufacture or production of food products which are unfit for beverage use as provided in Section 23112, if such distilled spirits are sold to a person who holds a permit and identification number authorizing the filing of a claim for drawback of federal distilled spirits excise taxes under the Federal Non-Beverage Drawback Regulations.

(i) A minimum retail price schedule containing a minimum retail price for each package of any brand of beer may be filed under the provisions of this chapter by the person in control of such brand and when so filed, the provisions of this chapter and any rules adopted by the department for the administration of the provisions of this chapter shall apply to the sale of packages of such brand of beer.

(j) The department shall adopt rules whereunder minimum retail prices of distilled spirits will be made available to licensees; means of making such prices available may include, but need not be limited to, publication in trade journals or industry price books of general circulation among retail licensees in this state, or in parts or trading areas of this state.

SECTION 24755.1 BUSINESS AND PROFESSIONS CODE

§ 24755.1 Penalties for violation of section 24755

No criminal penalties shall be imposed on any licensee for a violation of the provisions of Section 24755 * * *. For every such violation committed during 36 consecutive months * * *, the department, in its discretion, may impose a monetary penalty or suspend or revoke a license as follows:

For the first violation, two hundred fifty dollars ($250) or a suspension not to exceed 10 days; for the second violation, one thousand dollars ($1,000) or a suspension not to exceed 30 days; for the third and subsequent violations, one thousand dollars ($1,000) or a suspension or revocation. The monetary penalties herein provided shall be due and payable by the licensee to the General Fund not later than 30 days from the date the department rendered its decision imposing * * * such a penalty. Should the licensee appeal * * * a decision of the department imposing a monetary penalty, he shall either pay the amount of the penalty under protest or execute a surety bond in the amount of the penalty. The surety bond shall be executed by the licensee as principal and a corporation such as is mentioned in Section 1056 of the Code of Civil Procedure in this state as surety, payable to the General Fund at such time as the final decision is rendered affirming the department's devision imposing the monetary penalty. If the final decision should reverse the decision of the department, the penalty paid by the licensee under protest shall be returned to him with interest at the rate of 6 percent per

annum or the surety bond executed by the licensee terminated. The license of a licensee against whom the department has imposed the monetary penalty and who has refused to pay the penalty for each violation under protest or execute a surety bond as herein provided shall be automatically suspended and shall remain suspended until such time as the licensee either pays the penalty under protest or executes the surety bond as herein provided.

Each sale in violation of Section 34755 shall constitute a separate violation.

Supreme Court, U. S.
FILED
OCT 14 1975
MICHAEL RODAK, JR., CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-397

WARREN LOUIE, dba "a Waterhole #1"
Petitioner,

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL OF THE STATE OF CALIFORNIA,
Respondent.

Brief in Opposition to Petition for Certiorari

EVELLE J. YOUNGER
Attorney General of the State of California

STEPHEN L. PORTER
Assistant Attorney General

MATTHEW P. BOYLE
Deputy Attorney General
6000 State Building
San Francisco, California 94102
Telephone: (415) 557-1395
Attorneys for Respondent

BORG PRINTING COMPANY OF CALIFORNIA, 346 FIRST STREET, SAN FRANCISCO 94105

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In the Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-397

WARREN LOUIE, dba "a Waterhole #1"
Petitioner,

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL OF THE STATE OF CALIFORNIA,
Respondent.

Brief in Opposition to Petition for Certiorari

STATEMENT OF THE CASE

On October 17, 1973 an Accusation was filed against petitioner's retail liquor license. It alleged three different sales of liquor in violation of law. It further set out of the petitioner's license history showing other previous violations of the liquor fair trade laws.

The Accusation was served, petitioner filed a Notice of Defense, and a hearing was held all in compliance with the provisions of the California Administrative Procedure Act (Gov't Code 11500, *et seq.*). At the hearing petitioner offered no evidence whatsoever.

The proposed decision of the independent hearing officer found the charges true and recommended revocation. The Department adopted the decision, petitioner appealed to the Appeals Board and the decision was affirmed. The Court of

Appeals and California Supreme Court denied review; the Court of Appeals denied a stay and this Honorable Court denied a stay pending petition for certiorari.

It is our position that this case does not meet the requirements of Rule 19 in that: There are no substantial federal questions; petitioner failed to raise any issues of the Antitrust Laws below; the questions of State Law have been decided adversely to the petitioner.

ARGUMENT

I. The California Retail Price Maintenance Provisions Are Not In Conflict with Federal Law Nor Was This Issue Raised Below.

It should be noted that petitioner's present counsel did not represent him before the Department, the Appeals Board, or in seeking a writ of review.

We are sure counsel has acted in good faith but the Antitrust argument made here was not presented to the Department nor is it contained in petitioner's brief to the Appeals Board. In fact, petitioner presented no evidence before the Department whatsoever.[1]

Respondents submit therefore that the raising of such objections or issues is not timely, that the appellant has failed to exhaust its administrative remedies with respect thereto, and that the review of administrative decisions is confined to the issues appearing in the record of the administrative body as made out by the parties in said administrative proceedings (*Harris v. ABC Appeals Board,* 197 Cal. App. 2d 182, 187 (1961); *Epstein v. California Horse Racing Board,* 222 Cal. App. 2d 831, 835-836 (1963); and *Yen Eng v. Board of Building & Safety Commissioners* (1960), 184 Cal. App. 2d 514, 518).

1. Attached as our Appendix "A" is petitioner's brief to the Appeals Board. The Appendix to the Petition contains the Department's decision and that of the Appeals Board.

As succinctly stated in *Bohn v. Watson,* 130 Cal. App. 2d 24, 37 (1954), hearing by Supreme Court denied:

> ". . . It is fundamental that the review of administrative proceedings provided by section 1094.5 of the Code of Civil Procedure is confined to issues appearing in the record of that body as made out by the parties to the proceedings, though additional evidence, in a proper case may be received. (citation) It was never contemplated that a party to an administraive hearing should withhold any defense then available to him or make only a prefunctory or 'skeleton' showing in the hearing and thereafter obtain an unlimited trial de novo, on expanded issues, in the reviewing court. (citation) The rule compelling a party to present all legitimate issues before the administrative tribunal is required in order to preserve the integrity of the proceedings before that body and to endow them with a dignity beyond that of a mere shadow-play."

But even assuming, arguendo, that the appellant may now properly raise these issues before this Court, an examination of said issues reveals them to be without merit.

Both traditionally[2] and under the Twenty-first Amendment[3] the power of a state to regulate and control alcoholic beverages destined for use, distribution or consumption within its borders—including seizure or complete prohibition as well as any restriction falling short of prohibition

2. Mugler v. Kansas, 123 U.S. 623, 657-671 (1887); Crowley v. Christensen, 137 U.S. 86, 91 (1890); Giozza v. Tiernan, 148 U.S. 657, 661-662 (1893); Cronin v. Adams, 192 U.S. 108, 114-115 (1904); Cox v. Texas, 202 U.S. 446, 451 (1906); Purity Extract Co. v. Lynch, 226 U.S. 192, 201 (1912); Seaboard Air Line Ry. v. North Carolina, 245 U.S. 298 (1917); Crane v. Campbell, 245 U.S. 304, 307 (1917); McCormick & Co. v. Brown, 286 U.S. 131, 140-141 (1932).

3. State Board of Equalization v. Young's Market, 299 U.S. 58, 63-64 (1936); Mahoney v. Triner Corp., 304 U.S. 401 (1938); Joseph S. Finch & Co. v. McKittrick, 305 U.S. 395 (1939); Ziffrin v. Reeves, 308 U.S. 132, 138 (1939); United States v. Frankfort Distilleries, Inc. 324 U.S. 293 (1945).

even if discriminatory in nature—has been almost unconditional.

Except for cases involving: (a) foreign commerce[4], (b) import-export[5], (c) interestate commerce in transit through the regulating state[6], (d) federal enclaves[7], and (e) possible intolerable burdens on interstate commerce outside of the regulating state[8], this Honorable Court has consistently denied certiorari or dismissed appeals for want of a substantial federal question in cases involving state regulation and control of alcoholic beverages destined for use, distribution or consumption within the state's borders.[9]

As set forth by this Honorable Court in *Seagram v. Hostetter*, 384 U.S. 35 at 41-43 (1966):

> ". . . The appellants attack #9 on many constitutional fronts. They contend that its provisions place an illegal burden upon interstate commerce, conflict with federal antitrust legislation and thus fall under the Supremacy Clause, and violate both the Due Process Clause and the Equal Protection Clause of the Fourteenth Amendment. We find all these contentions without merit.

4. U.S. Const. Art. I § 8, cl.3; Hostetter v. Idlewild Bon Voyage Liquor Corp., 377 U.S. 324 (1964); Department of Alcoholic Beverage Control v. Ammex Warehouse Co., 378 U.S. 124 (1964).

5. U.S. Const. Art. I § 10, cl.2; Department of Revenue v. James B. Beam Distilling Co., 377 U.S. 341 (1964); Low v. Austin, 13 Wall. 29 (1871); and see Parrott & Co. v. San Francisco, 131 Cal. App. 2d 332, 280 P.2d 881 (1955).

6. Duckworth v. Arkansas, 314 U.S. 390 (1941); Carter v. Virginia, 321 U.S. 131 (1944); Gordon v. Texas, 355 U.S. 369 (1958).

7. Collins v. Yosemite Park Co., 304 U.S. 518 (1938).

8. Seagram & Sons v. Hostetter, 384 U.S. 35 (1966). Cf. United States v. Frankfort Distilleries, 324 U.S. 293, 299 (1945).

9. California v. Washington, 358 U.S. 64 (1958), motion to file complaint denied; Hooper v. Duncan, 379 U.S. 27 (1964), appeal dismissed for want of a substantial federal question; Plaza Liquor Stores, Inc. v. City of Atlanta, 381 U.S. 914 (1965), cert. denied; Laird & Co. v. Cheney, 385 U.S. 371 (1966), appeal dismissed for want of a substantial federal question; Inman v. City of Miami, 389 U.S. 1048 (1968), cert. denied.

> "Consideration of any state law regulating intoxicating beverages must begin with the Twenty-first Amendment, the second section of which provides that: 'The transportation or importation into any State, Territory, or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited.' As this Court has consistently held, 'That Amendment bestowed upon the states broad regulatory power over the liquor traffic within their territories.' (Citations) Just two terms ago we took occasion to reiterate that 'a State is totally unconfined by traditional Commerce Clause limitations when it restricts the importation of intoxicants destined for use, distribution, or consumption within its borders.' (Citations)
>
> ". . . the present case concerns liquor destined for use, distribution or consumption in the State of New York. In that situation, the Twenty-first Amendment demands wide latitude for regulation by the State."

In *Indianapolis Brewing Co. v. Liquor Commission*, 305 U.S. 391, 394 (1939), this Court held that state alcoholic beverage control laws, even though discriminatory in nature, could not be considered as in violation of the due process clause of the Fourteenth Amendment. And to the same point see *Mahoney v. Triner Corp.*, 304 U.S. 401 (1938) and *Ziffrin, Inc. v. Reeves*, 308 U.S. 132, 138 (1939).

In the case of *California v. Washington*, 358 U.S. 64 (1958), wherein the State of California sought to prevent the State of Washington from imposing discriminatory regulations on California wines being marketed in the State of Washington, this Court *refused* to hear the case, citing in its per curiam opinion: U.S. Constitution, Amend. XXI, § 2; *Indianapolis Brewing Co. v. Liquor Commission*, supra; *Joseph S. Finch & Co. v. McKittrick*, 305 U.S. 395; *Mahoney v. Joseph Triner Corp.*, supra; and *State Board of Equalization v. Young's Market*, 299 U.S. 59.

Perhaps the most striking expression of the dominant role played by the Twenty-first Amendment with respect to state regulation of alcoholic beverages is that found in *State Board of Equalization v. Young's Market Co.*, 299 U.S. 59, 63-64 (1936):

> ". . . A classification recognized by the Twenty-first Amendment cannot be deemed forbidden by the Fourteenth."

Since possession and sale of alcoholic beverages are not inherent rights of citizenship nor proprietary rights,[10] and inasmuch as the Twenty-first Amendment constitutionally separates alcoholic beverages apart from all other commodities, this Court has held that the due process and equal protection clauses of the Fifth and Fourteenth Amendments are not controlling with respect to a state's regulation of alcoholic beverages within the state's borders.[11]

And particularly to the instant appeal and the issues the appellant seeks to raise concerning state regulations dealing with female employees on alcoholic beverages premises and the review procedures provided as to California Department of Alcoholic Beverage Control decisions, see the most recent decisions of this Honorable Court refusing review of, and dismissing appeals for want of a substantial federal question in, petitions and appeals involving such issues: *Corsetti v. Dept. of Alcoholic Beverage Control of the State of California*, No. 71-329 ....U.S..... (Dec. 20, 1971) *Keller v. California Dept. of Alcoholic Beverage Control* 400 U.S. 806 (1970); *Meacham dba "Barbary Coast" v. California Dept. of Alcoholic Beverage Control*, 393 U.S. 855 (1968); *Probro, Inc. v. Dept. of Alcoholic Beverage*

10. Crowley v. Christensen, 137 U.S. 86, 91 (1890); Crane v. Campbell, 245 U.S. 304, 308 (1917).

11. U.S. Const., 21st Amendment; California v. Washington, 358 U.S. 64 (1958), and the authorities cited in footnotes 1 & 2, supra.

Control of California, 392 U.S. 855 (1968); and see *Derrington v. City of Portland* (Ore.) 451 P.2d 111, certiorari denied 396 U.S. 901 (1969).

In *La Rue v. State of California*, 409 U.S. 109 (1972), this Court once again recognized the vitality of the Twenty First Amendment and we submit the concept is dispositive here. Attempts to raise the Antitrust Laws to invalidate the fair trade laws in California are not new. They were rejected in *Allied Properties v. ABC*, 53 Cal. 2d 141 (346 P.2d 737) and *Wilke Holzheiser v. ABC*, 65 Cal.2d 349 (55 Cal. Rptr. 23 420 P.2d 735).

II. We Do Not Deal Herein with the Marketing of a Harmless and Ordinary Commodity Beneficial to the Public, Nor with Any Proprietary Right of the Appellant to Sell Any Such Products; We Deal Herein with the Sale of Liquor, with the Prevention and Control of Its Attendant Social and Economic Evils, and with Appellant's Mere Permit or Privilege to Sell Same.

Alcoholic beverages have long been recognized as constituting a dangerous commodity whose attendant social and economic evils require that its sale be permitted only under such conditions as will limit to the utmost its evils.[12]

Nor has the danger to public welfare from alcoholic beverages diminished in recent years. Recent reports and actions of the Legislature[13], the Governor [14], the State Department

12. *Schaub's Inc. v. Dept. of Alcoholic Beverage Control*, 153 Cal. App. 2d 858, 866 (1957), hearing by Supreme Ct. denied; *Crowley v. Christensen*, 137 U.S. 86, 91 (1890).

13. § 427, Health & Safety Code (Stats. 1965, ch. 1431 §2).

14. Statement and Recommendations of Governor Brown submitted to the California Legislature, April 20, 1965;
Press Statement of Governor Brown in signing Senate Bill 1279 on July 15, 1965;
Message to the California Legislature, January 5, 1965.

of Public Health[15] and the State Department of Justice[16] clearly demonstrate that the use of alcoholic beverages has become California's number one health problem, is a major factor in both crimes and fatal traffic collisions in this State, results in immense losses on the California economic scene, is steadily increasing the costs of local, county and state governments, and causes unmeasurable destruction of social and moral values in California's families, children and individual citizens.

Thus, one finds that under the provisions of the Twenty-first Amendment to the United States Constitution and Article XX, section 22 of the California Constitution this State possesses almost unlimited power and complete jurisdiction as to the prohibition, restriction, control and regulation of alcoholic beverages destined for use, distribution or consumption within its borders[17], and that alcoholic bev-

15. "Prevention, Treatment and Control of Alcoholism in California" State Department of Public Health, Berkeley, 1965, pp. 7-8.

16. "Adult Criminal Detention", Bureau of Criminal Statistics, State Department of Justice, Sacramento, 1965. A recently completed pilot study of the inmate county jail population of five central California counties (San Francisco, Contra Costa, San Joaquin, Stanislaus and Tuolumne) showing that drunk and disorderly conduct commitments—exclusive of drunk driving commitments—make up the majority of all prisoners serving sentences in each of said county jails except Contra Costa where said commitments —exclusive of drunk driving commitments—are second in number only to traffic offense commitments.

17. U. S. Const., XXI Amend.; Calif. Const., art. XX, § 22; *Hostetter v. Idlewild Bon Voyage Liquor Corp.*, 377 U. S. 324 (1964); *California v. Washington*, 358 U. S. 64 (1958); *United States v. Frankfort Distilleries, Inc.*, 324 U. S. 293 (1945); *State Board of Equalization v. Young's Market*, 299 U. S. 58, 63-64 (1936); *Ziffrin v. Reeves*, 308 U. S. 132, 138 (1939); *Mahoney v. Triner Corp.*, 304 U. S. 401 (1938); *Indianapolis Brewing Co. v. Liquor Commission*, 305 U. S. 391, 394 (1939); *Washington Brewers Institute v. United States*, 137 F. 2d 964 (9th Cir. 1943), cert. denied 320 U. S. 776; *Wylie v. State Board of Equalization*, 21 F. Supp. 604, 605-606 (U. S. D. C. Calif. 1937); *Allied Properties v. Department of Alcoholic Beverage Control*, 53 Cal. 2d 141, 147 (1959); *Dave's Market v. Department of Alcoholic Beverage Control*, 222 Cal. App. 2d 671 (1963), hearing by Supreme Court denied (1964); *Sandelin v. Collins*, 1 Cal. 2d 147, 153 (1934).

erages occupy a singular and legally unique position within the ambit of state regulation and control of business and commerce, and constitute a commodity whose legal status is sui generis as to all other commodities being sold in the market place.

Consistent with the recognition of alcoholic beverages as a dangerous commodity involving the health, welfare, safety and morals of the public—and the sale of which the State may either prohibit or restrict under such conditions and regulations as it may deem proper—is the equally well established principle that the legal status of an alcoholic beverages licensee is no more than that of a mere permit or privilege holder.[18]

18. "Unlike the rule with respect to the right to deal in ordinary commodities considered in the numerous cases cited and relied on by respondent, there is no inherent right in a citizen to sell intoxicants (citations); and a license to do so is not a proprietary right within the meaning of the due process clause of the Constitution (Const. art. I, § 13), nor is it a contract (citation); it is but a permit to do what would otherwise be unlawful . . ." *State Board of Equalization v. Superior Court*, 5 Cal. App. 2d 374, 377 (1939), hearing by Supreme Court denied.

". . . 'It has long been uniformly held that there is no inherent right in a citizen to engage in the business of selling alcoholic beverages (citations), and that "The regulation of that business is governed by legal principles different from those which apply to what may be termed inherently lawful avocations." The governing authority may, therefore, in the exercise of the police power for the protection of the public morals, health and safety, grant the *privilege* of selling alcoholic beverages upon such terms and conditions as it may determine. (citations)" *Kirchhubel v. Munro*, 149 Cal. App. 2d 243, 247-248 (1957), hearing by Supreme Court denied; *Schaub's Inc. v. Department of Alcoholic Beverage Control*, 153 Cal. App. 2d 858, 869-870 (1957), hearing by Supreme Court denied. And see *Sibert v. Department of Alcoholic Beverage Control*, 169 Cal. App. 2d 563, 566 (1959).

As concisely set forth by Mr. Justice Peters in speaking for the court in *Cooper v. State Board of Equalization*, 137 Cal. App. 2d 672, 679 (1955):

> "Appellants next contend that the statutes involved are unconstitutional in that they permit the deprivation of a valuable property right without due process. Of course a liquor license has certain attributes of property. It certainly has value and is sold commercially. But it is the type of property which the state, under the police power, has the power to control and regulate. The proper rule was stated in Kaname Tokaji v. State Board of Equalization, 20 Cal. App. 2d 612, 614 (67 P. 2d 1082), as follows: 'It is well settled that the right to possess, make or deal in intoxicating liquor is not a privilege, nor such a property right that state legislation prohibiting, restricting or regulating its manufacture, use, possession, distribution or sale violates the Fourteenth Amendment of the federal Constitution. (Citations.) Regarding this subject it was recently declared: "Unlike the rule with respect to the right to deal in ordinary commodities . . . there is no inherent right in a citizen to sell intoxicants . . . and a license to do so is not a proprietary right within the meaning of the due process clause of the Constitution . . . It is but a permit to do what would otherwise be unlawful, and consequently, a statute authorizing its revocation does not violate the due process clause . . ." ' (Citations.)

Lastly we would note that the Legislature has declared in section 23001 of the Alcoholic Beverage Control Act that the control and regulation of the sale of alcoholic beverages is "for the protection of the safety, welfare, health, peace and morals of the people of the State, to eliminate the evils of unlicensed and unlawful manufacture, selling, and disposing of alcoholic beverages, and to promote temperance in the use and consumption of alcoholic beverages."

And that "(i)t is hereby declared that the subject matter of this division involves in the highest degree the economic, social, and moral well-being and the safety of the State and of all its people. All provisions of this division shall be liberally construed for the accomplishment of these purposes."

And in interpreting the aforesaid section, our appellate courts have held that it is "(t)he 'economic' welfare which will be achieved by strict regulation and curtailment of the use of liquor and the economic benefits resulting to the people from the promotion of temperance, rather than those resulting from the promotion of the liquor industry which is meant by such section."[19] Yet California nevertheless gives its licensees all the procedural protections contained in Govt. Code 11500 et seq.

III. Selling Liquor at Cut-Rate and Bargain Prices Below the Mandatory Minimum Consumer Prices Is Violative of the Alcoholic Beverage Control Laws and Contrary to Public Welfare and Morals.

That the regulation and control of the sale of alcoholic beverages vitally involves public welfare and morals is evident not only from the federal constitutional recognition of same patent in the unmatched, unparalleled and extraordinary scope of state power and control provided for by the Twenty-first Amendment, but is also clearly manifested in the special state constitutional provisions dealing with alcoholic beverages[20], the establishment by the people of a special constitutional state agency empowered to protect public welfare and morals in connection with the sale of

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19. *Duke Molnar Liquor Co. v. Martin*, 180 Cal. App. 2d 873, 880 (1960), hearing by Supreme Court denied; *American Distilling Co. v. State Board of Equalization*, 144 Cal. App. 2d 457, 462 (1956).

20. Calif. Const., Art. XX, § 22.

alcoholic beverages, judicial decisions imposing a "strict liability" on those who exercise the privilege of selling alcoholic beverages[21], and the statutory declaration of the Legislature in which the control and regulation of the sale of alcoholic beverages is declared to involve *"in the highest degree the economic, social and moral well-being and the safety of the State and of all its people."*[22]

Turning to the mandatory minimum consumer price controls for liquor, one finds that following the end of Prohibition, the easing of the depression years and the return to a more prosperous buying public in the late thirties, the State Board of Equalization in 1939—acting under the powers conferred upon it by Article XX, section 22 of the State Constitution, and in order to prevent both the excessive purchasing of liquor by consumers and the disorderly marketing conditions resulting from cut-rate bargain sales and price wars—placed liquor under mandatory minimum consumer price controls[23], and enforced same through disciplinary actions from 1939 to March of 1944. In 1944 the Board suspended the operation of the mandatory minimum consumer price controls inasmuch as World War II conditions at that time (liquor shortage and

21. *Morell v. Department of Alcoholic Beverage Control,* 204 Cal. App. 2d 504, 513 (1962), hearing by Supreme Court denied; *Munro v. Alcoholic Beverage Control Appeals Board,* 154 Cal. App. 2d 326, 329 (1957), hearing by Supreme Court denied; *Mercurio v. Department of Alcoholic Beverage Control,* 144 Cal. App. 2d 626, 630-631, hearing by Supreme Court denied; *DeMartini v. Department of Alcoholic Beverage Control,* 215 Cal. App. 2d 787, 815 (1963), hearing by Supreme Court denied; *Benedetti v. Department of Alcoholic Beverage Control,* 187 Cal. App. 2d 213, 218 (1960); *Givens v. Department of Alcoholic Beverage Control,* 176 Cal. App. 2d 529 (1959); and *Swegle v. State Board of Equalization,* 125 Cal. App. 2d 432 (1954).

22. Section 23001, Alcoholic Beverage Control Act (Bus. & Prof. Code), emphasis added.

23. Rule 42, State Board of Equalization, 1939.

O.P.A. ceiling prices) had removed cut-rate bargain sales and price wars from being a practical problem in liquor control.[24].

With the end of World War II, and the subsequent ending of the liquor shortage and O.P.A. price controls, the mandatory minimum consumer price system for liquor was reinstated by the State Board of Equalization on March 1, 1947, under its renumbered Rule 99[25].

Following the launching of a legal attack upon the reasonableness and validity of the State Board's position and action in making minimum consumer price controls mandatory for liquor, and during the pendency of said litigation[26], the 1947 Legislature immediately espoused, supported and reinforced the State Board's position and action by adding to it the weight and support of the Legislature's concurring determination that the protection of public welfare and morals requires the prevention of disorderly marketing conditions and cut-rate bargain sales and price wars in the marketing of liquor to consumers and, by enacting section 55.6 of the former Alcoholic Beverage Control Act[27], made minimum consumer price controls for liquor compulsory by legislative mandate as well as by State Board rule.

Said mandatory minimum consumer price controls have remained in effect under State Board of Equalization and

24. Rule 42, State Board of Equalization, (1939-1940); renumbered as Rule 22 (1941-1944); renumbered as Rule 99 (1945). Rule suspended on March 9, 1944 by order of the State Board of Equalization. See Rule 99, State Board of Equalization, Title IV, Calif. Admin. Code, 1945.

25. Section 99, Title IV, Calif. Admin. Code, 1947 Register No. 7.

26. *Nelson v. Reilly,* 88 Cal. App. 2d 303 (1948).

27. Stats. 1947, ch. 657, p. 1698.

Department of Alcoholic Beverage Control rules, and subsequent legislative enactments, to the present moment.[28]

Thus, for some thirty-six (36) years (1939-1975), first by a constitutional agency's action alone (1939-1947),[29] and then by the combined action of the constitutional agency and the Legislature (1947-1975), mandatory minimum consumer price controls for liquor have been part of the alcoholic beverage control laws of this State.

Noteworthy also is that the Legislature in 1961 re-emphasized the involvement of public welfare and morals in the mandatory minimum consumer price controls for liquor by setting forth in section 24749[30] of the Alcoholic Beverage Control Act that:

> "It is the declared policy of the State that it is necessary to regulate and control the manufacture, sale, and distribution of alcoholic beverages within this State for the purpose of fostering and promoting temperance in their consumption and respect for and obedience to the law. In order to eliminate price wars which unduly stimulate the sale and consumption of alcoholic beverages and disrupt the orderly sale and distribution thereof, it is hereby declared as the policy of this State that the sale of alcoholic beverages should be subjected to certain restrictions and regulations. The necessity for the enactment of provisions of this chapter is, therefore, declared as a matter of legislative determination."

And in 1963, the Legislature still further emphasized the importance of the mandatory minimum consumer price con-

28. Section 99, Title IV, Calif. Admin. Code, 1966; section 24755, Alcoholic Beverage Control Act. (Bus. & Prof. Code).

29. Except from March, 1944 through 1946, when the minimum consumer price controls were suspended during the period of a liquor shortage.

30. Stats. 1961, ch. 635.

trols to public welfare and morals by enacting section 23053.5[31] of the Alcoholic Beverage Control Act whereby special, additional annual license fees are imposed on liquor retailers, wholesalers and manufacturers to provide additional funds for more adequate and strict enforcement of the mandatory minimum consumer price laws.

The Supreme Court declared in *Allied Properties v. Department of Alcoholic Beverage Control*, 53 Cal. 2d 141, 145-149 (1959) that the Legislature's and the Department of Alcoholic Beverage Control's mandatory minimum consumer price requirements for liquor were valid in that the prevention of disorderly marketing conditions in the sale of alcoholic beverages and the removal of some of the factors which may lead to intemperance were legitimate public welfare and morals objectives, and that the prevention of price-cutting, bargain sales and price wars in the retail sale of liquor were reasonable means to obtain the elimination of some of the causes of said evils.

The aforeesaid determination has been fortified by subsequent appellate decisions[32]—upholding the suspensions and revocations of the liquor selling privileges of those licensees who, by making unlawful cut-rate bargain sales of liquor in total disregard of the mandatory laws under which their privilege to sell liquor must be exercised, have insisted upon placing their own financial gain and competitive posi-

31. Stats. 1963, ch. 1026.

32. *DeMartini v. Department of Alcoholic Beverage Control*, 215 Cal. App. 2d 787 (1963), hearing by Supreme Court denied; *Dave's Market v. Department of Alcoholic Beverage Control*, 222 Cal. App. 2d 671 (1963), hearing by Supreme Court denied (1964); *Cohon v. Department of Alcoholic Beverage Control*, 218 Cal. App. 2d 332 (1963); and *United Liquors v. Department of Alcoholic Beverage Control*, 218 Cal. App. 2d 450 (1963). And see also *Peck's Liquors v. Superior Court*, 221 Cal. App. 2d 772, 780-781 (1963), hearing by Supreme Court denied.

tion over and above the welfare and morals of their fellow citizens.

The mandatory exclusion of cut-rate bargain sales and price wars prevents: (1) the disruption of the orderly sale and distribution of liquor, and (2) curbs factors leading to the intemperate use of liquor by suppressing the excessive purchases of liquor that result from the bargain sales of, and price wars between, the major known brands (and to a lesser extent the unknown brands) of liquor which enjoy a great degree of public acceptance[33] in the alcoholic beverage market.

We submit therefore that appellant's conduct in deliberately and repeatedly making cut-rate and bargain sales of liquor to consumers at prices below the mandatory minimum consumer prices was and is contrary to public welfare and morals and thereby good cause under Article XX, section 22 of the State Constitution for the suspension or revocation of its privilege to sell liquor.

Finally, before leaving this area of interrelationship between public welfare and morals, the State's social and economic policies, the prevention of disorderly marketing conditions and the promotion of temperance in the sale of liquor, and the mandatory minimum consumer price controls being the means chosen by the State to achieve such ends—respondents would note that while this licensee as well as large individual and corporate licensees with multiple retail outlets in this State have continually argued and urged upon the *courts* that the mandatory minimum consumer price laws should be struck down by the *courts* as not being in the best interest of the public in that said price control laws are contra to that *economic policy* of our

33. See *Borden Co. v. Federal Trade Commission*, 339 F. 2d 133 (5th Cir. 1964).

free enterprise system which calls for free and vigorous competition in the market place with the resultant economic benefits to the buying public of lower prices and greater buying power, such reasoning consistently ignores that we are dealing here with a dangerous commodity and with the overriding social and economic policies concerning the prevention and control of its attendant evils.

And while this licensee and large chain licensees would undoubtedly savour the striking down of price controls on liquor whereby they would be free to set their own prices and engage in price wars and ruinous competition against the small individual retail liquor licensees, the "mom and pop" liquor stores and the neighborhood corner grocery store, with the resultant competitive attrition of the small business licensees accruing to their competitive and financial position while at the same time increasing their financial gain by greater volume selling of liquor through cut-rate bargain prices; it remains a well established and fundamental judicial canon long adhered to by the federal courts[34]

34. *Nebbia v. New York*, 291 U.S. 502, 537 (1933):
"So far as the requirement of due process is concerned, and in the absence of other constitutional restriction, a state is free to adopt whatever economic policy may reasonably be deemed to promote public welfare, and to enforce that policy by legislation adapted to its purpose. The courts are without authority either to declare such policy, or when it is declared by the legislature, to override it. If the laws passed are seen to have a reasonable relation to a proper legislative purpose, and are neither arbitrary nor discriminatory, the requirements of due process are satisfied, and judicial determination to that effect renders a court functus officio. 'Whether the free operation of the normal laws of competition is a wise and wholesome rule for trade and commerce is an economic question which this court need not consider or determine.' (Citation.) And it is equally clear that if the legislative policy be to curb unrestrained and harmful competition by measures which are not arbitrary or discriminatory it does not lie with the courts to determine that the rule is unwise. With the wisdom of the policy adopted, with the adequacy or practicability of the law encated to

that it is not within the province of the courts to weigh the desirability of the social or economic policies adopted by a state to promote and protect public welfare and morals, nor to choose between competing policies, and that the wisdom of the policy adopted, and the adequacy of practicability of the means chosen to achieve same, are outside the judicial orbit.

IV. Given Petitioner's Previous Record, the Filing of an Accusation with Three Sales Included Was Not a Violation of Law.

In 1972, facing the fact that violations were continuing despite the heavy fines that could be imposed, the Legislature amended Business and Professions Code section 24755.1 to return to the Department the power to revoke licenses of those who make three sales in violation during a 3-year period. It was under this statute as amended that

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forward it, the courts are both incompetent and unauthorized to deal."

Heart of Atlanta Motel, Inc. v. United States, 379 U. S. 241, 255 (1964);

United States v. Frankfort Distilleries, 324 U. S. 293, 301 (1945);

". . . If a State for its own sufficient reasons deems it a desirable policy to standardize the price of liquor within its borders either by a direct price-fixing statute or by permissive sanction of such price fixing in order to discourage the temptations of cheap liquor due to cut-throat competition, the Twenty-first Amendment gives it that power and the Commerce Clause does not gainsay it."

Washington Brewers Institute v. United States, 137 F. 2d 964, 968 (9th Cir. 1943) cert. denied 320 U. S. 776:

". . . the broad theory of the Sherman Act—that trade should be free of artificial restraints—is in many respects incompatible with the policy of state liquor-control legislation; and wherever such conflicts exist the Sherman Act must give way, just as the commerce clause itself gives way in identical circumstances. Where invocation of that Act tends to hamper or interfere with the enforcement of state laws regulatory of the transportation or importation of intoxicants, the Act is unenforceable."

And see *Thain v. City of Palo Alto,* 207 Cal. App. 2d 173, 187 (1962), hearing by Supreme Court denied; *Wadley v. County of Los Angeles,* 205 Cal. App. 2d 668, 671 (1962).

petitioner made the unlawful sales and the discipline imposed.

Prior to that time, the Legislature, in attempting to have the law obeyed, provided that fines immediately payable after a Department decision might work better. The case of *Walsh v. Kirby* (1974), 13 Cal. 3d 95 explains this in greater detail. *Walsh* held that where there were no priors, the Department should not accumulate violations before filing charges because this practice could constitute a de facto revocation of an unwitting violator. The decision dealt with the statute *before* the amendment and specifically pointed out:

> "We do not express any view whether departmental conduct similar to that in the instant case would be arbitrary if exercised against a licensee who, the record would show, was an habitual offender and unwilling to conform. (See *Dave's Market, Inc. v. Dept. of Alcoholic Beverage Control* (1963), 222 Cal. App. 2d 671, 680 [35 Cal. Rptr. 348].)"

The prior accusations and decisions against petitioner showed he had to have full knowledge before the violations at issue occurred. Despite this knowledge, he persisted in making these sales. Thus, as *Dave's Market v. ABC* (....) 222 Cal. App. 2d 671 held, consideration of his prior record was entirely proper. It is a *sale,* not a fully litigated violation, which is significant. The last sentence of Business and Professions Code section 24755.1 provides:

> "Each sale in violation of Section 24755 shall constitute a separate violation."

If consideration could not be given until all appeals had been exhausted, the practical effect would prevent three

violations ever occurring within three years and revocation would never be possible.

Witness the present case. The present Accusation was served in November 1973, the California Supreme Court denied hearing in June 1975. If petitioner's theory is accepted, the Department could now impose a $250.00 fine or 10-day suspension and file a new charge eventually imposing, in another 17 months, a possible $1,000 fine or 30-day suspension.

Business & Professions Code section 24755.1 clearly provides that three sales are grounds for revocation. The prior charges placed him on notice of the Fair Trade laws. Nothing more under *Walsh* is required.

V. Petitioner Was Not Declared "an Habitual Offender" Without a Prior Hearing.

Petitioner argues that he has a right to notice and a hearing on *whether he is an habitual offender* before the Department can allege more than one count in an Accusation. Such a proposition fails to consider that on all the previous Accusations petitioner had a right to a full notice and hearing (Gov. Code § 11500 et seq.); that he took advantage of them and, moreover, appealed every adverse decision.

At the hearing in this matter he had a right to litigate the issue in that such an inference led directly to the revocation. Thus he had a hearing and he had notice.

What petitioner is really stating is this: the State must prove he is a persistent violator before it is allowed to prove he is a persistent violator.

VI. Respondent Was Not Required to Prove Petitioner Had Actual Notice of the Minimum Price Schedules.

There is no requirement that a licensee receive actual notice of the minimum retail price schedules.

Reimel v. ABC Appeals Bd., et al. 256 Cal. App. 2d 158 (1965) 64 Cal. Rptr. 26. Title 4, California Administrative Code 99.2(a).

Samson Market v. ABC Appeals Bd. (1969) 71 Cal. 2d 1215, 1220 fn. 3.

The law places upon the licensee the duty to stay aware of the schedules and provides various means for doing so. See for example, Title 4, California Administrative Code section 99.2(e). Since the prices are contained in various easily obtainable periodicals, the burden is not a heavy one.

VII. The Previous Charges Were Not Improperly Considered.

Petitioner seems to suggest that the prior violations could not be considered for any purpose until all appeals had been exhausted. They clearly could be considered to show knowledge of the Fair Trade laws.

See *Dave's Market v. ABC Appeals Bd.* (1963) 222 Cal. App. 2d 671.

The three sales necessary to impose a revocation are contained in the very Accusation here in issue—the others simply helped prove knowledge and intent.

In any event, there is no real requirement that all appeals be exhausted before an offense constitutes a "conviction."

57 Ops.Cal.Atty.Gen. 374 (1974) exhaustively analyzed the various authorities in holding that a jury verdict and District Judge ratification sufficed to forfeit the second highest office in this State. It would appear, therefore, that petitioner is not in a position to really complain since the priors were pleaded in the Accusation and therefore placed in issue.

CONCLUSION

It is respectfully submitted that the petition for certiorari be denied.

Respectfully submitted,

EVELLE J. YOUNGER
Attorney General

STEPHEN L. PORTER
Assistant Attorney General

MATTHEW P. BOYLE
Deputy Attorney General

(Appendix follows)

Attorney for Appellant.

Before the Alcoholic Beverage Control Appeals Board of the State of California.

In the Matter of the Accusation against WARREN LOUIE, DBA: Water Hole # 1 366 - 8th Street Oakland, Ca. Off-Sale General License under the Alcoholic Beverage Control Act.	AB - 4134 File No. 19501 Reg. No. 18934

APPELLANT'S OPENING BRIEF

On Appeal from the Decision of The Department of Alcoholic Beverage Control, dated December 19, 1974, JEROME P. HERST, Hearing Officer.

STATEMENT OF THE CASE

This is an appeal from the decision of the Department of Alcoholic Beverage Control, dated December 19, 1974, Jerome P. Herst, Hearing Officer, whereby appellant was found in violation of Section 24755 of the Business and Professions Code (B & P) under Counts I, II and III, for which the penalty of revocation of the license was imposed in accordance with Section 24755.1 B & P.

STATEMENT OF FACTS

By accusation filed on or about October 17, 1973, appellant was accused of selling distilled spirits on three counts at a price less than "fair trade" price.

At the hearing of said accusation on March 26, 1974, the Department called one witness, namely, William Elledge, a

special investigator for the Department, who testified that he made purchases of distilled spirits from the Water Hole # 1, 366 - 8th Street, Oakland, California, on October 4, 11 and 26, 1973; that he was a peace officer (R.T. 12:14-16); that he did not advise the clerks or the sales person that they were violating the law (R.T. 14:18-20); that there were no other identifying marks on the bottles offered into evidence, except the manufacturer's label and the markings of the investigators (R.T. 18:18-24); that they did not receive any sales tag or cash register receipt for the purchases (R.T. 5:27-28); that he was provided with money to make purchases (R.T. 17:5-10); that they did not retain the change for evidence (R.T. 17:24-27). No other witnesses were called to corroborate Elledge.

The Department offered into evidence certified copies of the Distilled Spirits Minimum Retail Price Schedules on file with the Department, and the Department submitted its case.

Appellant submitted its case without further evidence.

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POINTS ON APPEAL

I. THERE IS NO SUBSTANTIAL EVIDENCE IN THE LIGHT OF THE WHOLE RECORD TO SUPPORT THE FINDINGS OF THE HEARING OFFICER AND HENCE, NO FINDINGS TO SUPPORT THE DECISION OF THE DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL.

II. THE DEPARTMENT HAS ACTED IN EXCESS OF ITS JURISDICTION AND HAS NOT ACTED IN THE MANNER REQUIRED BY LAW.

• • •

ARGUMENT

I.

There is no substantial evidence in the light of the whole record to support the findings of the Hearing Officer and hence, no findings to support the decision of the Department.

(a) In every prosecution of such violations, there is one element in common, and that is, that purchases were made by investigators of the Department. The same was true in the case at bar; and further, the testimony of each of the investigators was not corroborated by any other investigator. However, it is also abundantly clear that more must be shown by the Department, and we quote from 2 Cal. Jur. 2d 248, Sec. 145, and the cases cited thereunder:

> "While disciplinary proceedings involving the revocation or suspension of licenses are not criminal in nature, all intendments are in favor of the accused and the charges against him must be proved by clear and convincing evidence before the right to engage in the licensed profession or business may be taken away."

Taking the recent case of *Gourmet, Inc.*, AB-3565, File No. 58901, Reg. No. 9657, page 5, decided December 21, 1972, as a typical example as to what constitutes sufficiency of evidence, not only the testimony of the investigators is necessary, but also, evidence of publication and/or mailing of "fair trade" prices filed with the Department, as well as cash register receipts showing the sale at less than "fair trade" prices.

• • •

It is clear that except for the uncorroborated testimony of the investigator and the "unmarked" bottles of liquor offered into evidence, there were no cash register receipts offered into evidence showing the sales at less than "fair trade"; no evidence whatsoever offered to show that the "fair trade"

price lists or schedules were published in the trade journals or mailed to the licensee, as required under Sec. 24755(j) B & P, and in accordance with the decision announced in *Kirby v. ABC App. Bd.* (1966), 71 C. 2d 1200. Although the filing of the "fair trade" price lists or schedules was made "constructive notice" to all persons affected thereby by amendment of said section in 1966 (Sec. 24755(e)), it was left intact in Sec. 24875 (wine), as well as Sec. 24755(j). There is no rational reason why one section was made "constructive notice" and the other made mandatory publication and/or mailing. In accordance with due process and a sense of fair play, constructive notice cannot be made sufficient to prove a criminal or quasi-criminal charge. Due process requires actual notice to be proven.

There was no evidence that the "fair trade" price lists offered into evidence were, in fact, in effect on the date of each alleged violation, in view of the provisions of Sec. 24755(d) B & P, providing for changes upon 15 days' notice, and requiring additional publication and/or mailing of said changes. Although said documents were certified as genuine copies on file in the Department, it does not, however, certify that the various stamps and entries made by the Department were genuinely made because of changes made by the various applicants and on the dates said documents seem to imply.

II.

The Department has acted in excess of its jurisdiction and has not acted in the manner required by law.

• • •

In the 1972 session of the State Legislature, Section 24755.1 of the Business and Professions Code was amended to provide for suspensions and revocations, as well as monetary penalties, effective March, 1973.

During the period July 18, 1973 to October 26, 1973, a period of a little over three months, the Department by its agents, and in accordance with its preconceived plan or scheme to put appellant out of business, filed three accusations, including the present one being appealed from, as follows:

July 26, 1973, for a violation dated July 18, 1973: penalty of 10 days' suspension imposed. Appeal pending.

September 19, 1973, for two violations, August 29, 1973 and September 12, 1973: penalty of 30 days' suspension imposed. Appeal pending.

And the present accusation filed October 17, 1973 for three violations, October 4, 1973, October 11, 1973 and October 26, 1973: penalty of revocation imposed.

The Department, at all times, knew that prior accusations had been filed against appellant and that all of said accusations are still pending on appeal. But apparently frustrated in its previous attempts to put appellant out of business, under the old law, by accumulating violations which the Supreme Court has recently declared as an abuse of discretion and as not proceeding in a manner prescribed by law (*Walsh v. Kirby,* Sup. 118 Cal. Rptr. 1), the Department, proceeding under the new law, has once again "accumulated" violations in order to revoke appellant's license.

Certainly, on its face, the Department seems to have followed the letter of Section 24755.1 B & P; but taking into consideration the prior relation of the Department and appellant, it is readily apparent that the present accusation is the culmination of the Department's preconceived plan or scheme to put appellant out of business. Once again, Mr. Elledge, the investigator, who made prior investigations of appellant, deliberately failed to advise appellant or his employees of the new law which carried with it pen-

alties including suspension and revocation. The short period during which the violations occurred, or were accrued by the Department, did not afford appellant sufficient warning of the penalty of revocation on the third accusation.

The principles enunciated in *Walsh v. Kirby, supra,* are equally applicable in this case in the light of the whole relationship between the Department and appellant.

• • •

CONCLUSION

In conclusion, the decision of the Department, imposing the penalty of revocation on appellant, should be reversed for the reason that there is no substantial evidence in the light of the whole record to support the findings of the Hearing Officer and hence, the decision of the Department, that the Department abused its discretion and had not acted in the manner required by law.

For the foregoing reasons, appellant respectfully prays that the decision of the Department being appealed from be reversed and that the accusation against appellant be hence dismissed.

Dated: March 13, 1975, at Oakland, California.

RAYMOND D. LOUIE
Attorney for Appellant.

PROOF OF SERVICE BY MAIL— CCP 1013a, 2015.5

I declare that:

I am (a resident of/employed in) the county of Alameda, California.

I am over the age of eighteen years and not a party to the within cause; my business address is: 411 Central Building, 436-14th Street, Oakland, California 94612.

On March 13, 1975, I served the within Appellant's Opening Brief on the Respondent in said cause, by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid, in the United States mail at Oakland, California addressed as follows:

L. Stephen Porter, Deputy Attorney General
6000 State Building
San Francisco, Ca. 94102

I declare under penalty of perjury that the foregoing is true and correct, and that this declaration was executed on March 13, 1975, at Oakland, California.

A. M. WOTTON A. M. WOTTON